

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

OLD GRANITE DEVELOPMENT :  
LTD, :  
 :  
Plaintiff, :  
vs. :Case No. 3:06CV2950  
 :Judge Zouhary  
THE CITY OF TOLEDO, et al, :  
Defendants. :

- - -

Deposition of JOHN MCCARTHY, a Witness  
herein, called by the Defendants as upon  
Cross Examination under the Ohio Rules of Civil  
Procedure taken before Maureen St. John,  
Registered Professional Reporter and Notary  
Public in and for the State of Ohio, pursuant to  
stipulations of counsel, at the office of Bahret  
& Associates, 7050 Spring Meadows West Dr.,  
Holland, Ohio, on Wednesday, January 23, 2008, at  
11:10 a.m.

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1 DEPOSITION OF JOHN McCARTHY

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Also Present:

John Laskey

1 MR. BAHRET: Usual stipulations?

2 (All agreed)

3 JOHN A. MCCARTHY,

4 was by me first duly sworn, as hereinafter

5 certified, testified and said as follows:

6 CROSS EXAMINATION

7 BY MR. BAHRET:

8 Q. Could you state your full name?

9 A. It's John A. McCarthy.

10 Q. My name is Bob Bahret. I'm one of the

11 attorneys that represents the City of Toledo.

12 Have you ever been through this procedure before?

13 A. Yes, I have.

14 Q. So you understand the basic ground rules?

15 A. I think so.

16 Q. Then we will get right to it. What is your

17 age?

18 MR. ROBON: By the way, we should

19 decide, who is he billing? Is he billing the

20 City for his expert time or everybody?

21 MR. BAHRET: I assume he is billing

22 you.

23 MR. ROBON: He is our expert; you

24 called him as your witness.

25 MR. BAHRET: I didn't call him as

1 my witness.

2 MR. ROBON: Well, you called him to  
3 be deposed.

4 MR. BAHRET: Okay.

5 MR. FAGNILLI: He is a fact witness.

6 MR. ROBON: Well, he is really an  
7 expert witness too.

8 MR. FAGNILLI: He is really a fact  
9 witness though.

10 MR. ROBON: No opinions then.

11 THE WITNESS: Throw me out.

12 MR. ROBON: I mean, if you ask  
13 expert opinions --

14 MR. TASSE: You've read other  
15 transcripts, have you?

16 Q. What is your age?

17 A. I'm 61.

18 MR. ROBON: Let the record indicate  
19 that we have designated him as an expert, but  
20 they're not going to ask any expert opinions  
21 today.

22 Q. What is your residence address?

23 A. 529 Loomis Drive.

24 Q. Say it again, Loomis?

25 A. Loomis, L-o-o-m-i-s, Perrysburg, Ohio.

1 Q. Tell me about your educational background.

2 A. I'm a civil engineer.

3 Q. Where did you go to college?

4 A. I went to Clarkson University in Potsdam,  
5 New York.

6 Q. Where in New York?

7 A. Potsdam.

8 Q. What degree did you get?

9 A. It was a B.S. in civil engineering.

10 Q. What year?

11 A. '68.

12 Q. Any formalized education after that?

13 A. No master's degree or anything like that.

14 Q. By whom are you employed?

15 A. I'm self-employed.

16 Q. How long have you been self-employed?

17 A. I retired from the Corps of Engineers in  
18 2004, and I started consulting basically last  
19 year, so it's only been about a year.

20 Q. How long did you work for the Corps of  
21 Engineers?

22 A. Thirty years.

23 Q. You started there in?

24 A. '74, worked until 2004.

25 Q. Where did you work between '68 and '74?



1 A. I was -- I worked in New York City for the  
2 Con Edison Power Company for a couple years, and  
3 I worked another six or seven years in home  
4 building business.

5 Q. Can you be a little more specific? What did  
6 you do in the area of home building?

7 A. Yes, I was a construction superintendent  
8 mostly and mostly involved in home developments,  
9 construction.

10 Q. Where did you do that?

11 A. In New York and New Jersey.

12 Q. Why did you get out of that business?

13 A. Well, when the bottom fell out of the  
14 housing business in '73, I went to work for the  
15 Corps because there really wasn't any work in the  
16 home building business.

17 Q. What was your job with the Corps of  
18 Engineers?

19 A. Most of my years I spent as area engineer in  
20 Northwest Ohio.

21 Q. What does an area engineer in Northwest Ohio  
22 do?

23 A. The main job is construction administration,  
24 and we did, Corps of Engineers mainly, water  
25 resources, and we did dikes and levies along Lake

1 Erie and dredging of Toledo harbor and various  
2 projects associated with those two main functions  
3 that we had.

4 Q. When you say construction, what type of  
5 construction are you talking about?

6 A. Earth moving. Earth moving is dredging,  
7 too, but earth moving, building levies, doing the  
8 -- probably our biggest project, probably the  
9 easiest way to explain it would be we did Point  
10 Place dike with the City of Toledo was our  
11 partner in that.

12 And that was a major project, \$15  
13 million project, and we would do the rebuilding  
14 of levies, the pump houses, all the sewers and  
15 things that led to them and back-up dikes, sheet  
16 piling, concrete roads, the whole complex project  
17 like that, you end up doing the pretty full gamut  
18 of civil engineering kind of things.

19 Q. I'm assuming that you haven't been involved  
20 since you went to work for the Corps of Engineers  
21 in the development of any residential areas?

22 A. I haven't been, I haven't done any real  
23 residential work during that time, no.

24 Q. Have you done any since you've retired from  
25 the Corps?

1 A. Residential work? I haven't done anything  
2 other than in my own home and that kind of thing,  
3 just adding onto our house. But, no, I haven't  
4 done any actual development work.

5 Q. You said that you started doing some  
6 consulting work last year?

7 A. Uh-huh.

8 Q. That's a yes?

9 A. Yes.

10 Q. Was this Old Granite case your first  
11 consulting job?

12 A. No, I don't -- I believe we -- I've had a  
13 couple other jobs that we were -- I had one other  
14 job. But it's one of my first ones, yes.

15 Q. What other job did you have besides Old  
16 Granite?

17 A. I did some work on a permit down in a case  
18 down in Port Clinton where we were the developer  
19 of a marina. Marina area was trying to get a  
20 permit and that kind of thing, I was helping him  
21 out with some design work and some Corps of  
22 Engineers coordination, that kind of thing.

23 Q. What other clients have you had?

24 A. I worked for -- that's residential, too.  
25 I've worked for Dillin Associates, Dillin Homes

1       they call it over at Levis Commons.

2       Q.   What did you do for them?

3       A.   I was their construction manager for their  
4       new brownstones or condominiums over there.  Yes,  
5       that was another residential thing after.  That  
6       was in 2006, so, yes, I did.  Hard to remember.

7       Q.   What other clients have you had?

8       A.   None other.  Those are really the only three  
9       significant ones.  I've done some other small  
10      jobs, consulting jobs for a mobile home developer  
11      helping him out with some land development work,  
12      getting some letters written to the state for  
13      approval of some of his designs and things like  
14      that.  But I think that's about the only ones I  
15      really worked for.

16      Q.   How much are you charging Old Granite per  
17      hour for your services?

18      A.   Well, we haven't really been charging them  
19      anything, really.

20      Q.   Are you working for free?

21      A.   Yep.

22      Q.   Why is that?

23      A.   Well, Jack hasn't had any money for one  
24      thing, and he has paid for some expenses, you  
25      know.  I guess you wouldn't call that free, but

1 he has paid for some of my expenses, that kind of  
2 thing. He really hasn't had any money to  
3 reimburse me. He has given me a few checks for a  
4 few thousand dollars, maybe six, \$8,000,  
5 something like that.

6 But we had a contractor working for us  
7 one time, we started to build a mound, and we had  
8 some expenses like that. We had -- he did some  
9 -- we went and hired, or I went and hired for him  
10 Peterman to come out, Peterman Associates, which  
11 is a consultant that did the site design over at  
12 Cambridge.

13 We got him over, and he did surveying  
14 and did some. But most of that money he gave me  
15 was given to other people, some guys that helped  
16 me do some surveying over there and things like  
17 that. My mileage and things like that. He has  
18 given me some expenses.

19 Q. Let me interrupt you because I think the  
20 question that I asked you is how much were you  
21 getting paid, not how much were your expenses.  
22 And I think the simple answer to that is zero.

23 A. Right.

24 MR. BAHRET: Well, Marv, we will pay  
25 him the same hourly rate for his opinions.

1 MR. ROBON: He would decline your  
2 offer.

3 THE WITNESS: No thanks.

4 MR. ROBON: He was hoping to get  
5 \$1,000 an hour here to make up.

6 Q. Do you have an hourly rate in mind that  
7 you're going to charge?

8 A. No. You know, I kind of got involved in  
9 this thing as a -- because my kid lives at the  
10 development in Jack's sales office there. They  
11 have a model home like, and that's how I got  
12 involved in it. And we just, Jack and I have  
13 kind of become acquaintances and that, and we  
14 just -- I just can't believe what has happened  
15 over there. Kind of got -- we were going to  
16 build a mound, we were going to do this and that,  
17 and then this thing goes to another thing, and  
18 now we are here.

19 Q. Are you an expert in surveying?

20 A. Uh-huh.

21 Q. You are?

22 A. I'm not a registered surveyor, but I'm an  
23 expert in it because I've had a lot of training  
24 and experience in surveying.

25 Q. Have you ever done a survey?

1 A. Uh-huh.

2 Q. Yes?

3 A. Uh-huh.

4 Q. Yes? Use a word.

5 A. Yes.

6 MR. ROBON: She can't write down  
7 uh-huh or a shake of the head.

8 Q. For whom did you do surveys in the past?

9 A. Mostly with the Corps of Engineers.

10 Q. By the way, are you a registered  
11 professional engineer?

12 A. Yes.

13 Q. How long have you been registered?

14 A. I've been registered in Ohio since 1980, I  
15 think it was, and in New York since 1977 or '78.

16 Q. Getting back to the surveying idea, you said  
17 you did surveying for the Corps?

18 A. Yes, I had a survey crew that worked for me,  
19 and I would do the training with them and that.  
20 In the Federal Government you didn't need to be a  
21 registered surveyor to do surveys. As a matter  
22 of fact, we didn't have any, and we did a lot of  
23 surveying.

24 Q. Did you do any surveys for Old Granite?

25 A. Yes, I did some spot check surveys. But

1       when we had what we call legal surveys, what we  
2       needed it tied in with actual monuments and that,  
3       we used Peterman, who has a registered land  
4       surveyor.

5       Q. Did you ever hire any independent sources to  
6       do a --

7       A. Yeah, Peterman.

8       Q. The reason I was suggesting is Peterman  
9       might not be independent is my understanding is  
10      he's the guy that laid out the development to  
11      begin with.

12      A. Oh, yes, he was, and that was the only one  
13      we had.

14      Q. Did you ever check with anybody else to see  
15      if Peterman did it right?

16      A. Yeah, the City surveyors came out.

17      Q. City of Toledo?

18      A. Yeah, the City surveyors, they had no  
19      problem with the monuments that Peterman put in,  
20      which is really the legal part of the whole  
21      thing. And, furthermore, one survey overlapped  
22      the other. They were just on top of each other,  
23      within a quarter of an inch on the part that  
24      we're talking about here, the boundary lines. So  
25      there was no --



1 Q. So you're saying the City of Toledo survey  
2 crew agreed exactly with the parameters of the  
3 Peterman survey?

4 A. Oh, yes, and told me that, that they --

5 Q. Who was it that you were speaking to?

6 A. I would have to look back and get his name,  
7 but they have a survey party chief that was out  
8 on the site. He confirmed that the monuments  
9 were good, and they put -- we had a -- they put  
10 lath out there and we put lath out there. We're  
11 right on top of each other. They were within a  
12 quarter of an inch.

13 Q. What is lath?

14 A. That's the little boards that the surveyors  
15 use. Usually they put the ribbons on and that.

16 Q. I call them stakes, that sort of thing.

17 A. Well, a stake is something. In surveying, a  
18 stake is a square peg in the ground, and they put  
19 the lath on above it so you can see it. And  
20 that's also a marker.

21 Q. When was it that you had this conversation  
22 with the City of Toledo survey crew?

23 A. When they came out, which would have been  
24 early on in 2006 when they come out.

25 Q. Was this after the land was cleared?

1 A. Yes.

2 Q. Let me back up here. When did you first get  
3 involved in anything dealing with Old Granite?

4 A. The first time was, I believe, when my son  
5 called me and said, you know, I don't know  
6 whether I was over there or whether he called me.  
7 But he said, "You know, what the heck do you  
8 think this is in the back here, all this  
9 clearing?" I didn't know, but that was the first  
10 time I got involved when my son mentioned it to  
11 me.

12 Q. When historically was that conversation?

13 A. I would say it was early 2006, probably -- I  
14 would say probably February of 2006.

15 Q. Your understanding is that this clearing  
16 took place in the winter?

17 MR. ROBON: Don't guess, don't  
18 guess.

19 A. I don't -- we don't really know whether it  
20 was -- at this point. We could look it up.  
21 Whether it was February or April, it was in that  
22 time frame, and that was the first time I really  
23 got involved was when the clearing was already  
24 done and my son called me up. I think it was  
25 February that they started the clearing.

1 Q. And what was the issue for you at that  
2 point?

3 A. Well, he was asking me, you know, what would  
4 this be? Why would they be doing this? Then I'm  
5 kind of involved with these kind of things, you  
6 know, any kind of like land development stuff,  
7 you know, railroads, cities, public works, that  
8 kind of thing. My son was just asking me.

9 Q. When did your son move into that house in  
10 the development?

11 A. He moved in there in, it must have been  
12 sometime in 2005.

13 Q. Do you know when?

14 MR. ROBON: Don't guess.

15 A. I don't know. I think -- but sometime in  
16 2005.

17 Q. Do you know how long he was there before  
18 this clearing took place?

19 A. I would say he was there most of that year,  
20 most of 2005.

21 Q. So he was in the house at least a year then  
22 before this clearing took place?

23 A. Well, I don't know if it was a whole year,  
24 but it was approximately a year.

25 Q. In that time how many payments did he make

1 on the house, do you know?

2 A. That I don't know.

3 Q. Had you been to the house before the land  
4 behind the house was cleared?

5 A. Yes.

6 Q. Do you have any pictures?

7 A. No, not that I took or anything.

8 Q. When your son called you to say that  
9 somebody had cleared some of the stuff from  
10 behind his house near the railroad area, did you  
11 do any studies or anything?

12 A. When I came out, I think the first thing we  
13 did was --

14 Q. Who's the we?

15 A. Jack and I.

16 Q. By the way, did you know Mr. Laskey before  
17 that?

18 A. I think so. I think we knew each other  
19 casually, but this was the first time we really  
20 got involved with anything specific. I never  
21 worked for him before or anything, but I knew him  
22 from my son and that before then.

23 Q. So what did you do then?

24 A. As I recall, I think the first thing we did  
25 was Jack finally came down and we went like, you

1 know, who's clearing this thing and why are they  
2 taking down all these trees?

3 And I said that I would find out. I  
4 would find out what was going on. After that I  
5 did. I went and started inquiring what was going  
6 on with the people. I think the clearing people  
7 had not finished or were still out there. Some  
8 of their equipment was still out there, I  
9 remember that.

10 Q. Where was it?

11 A. The equipment was down just a little bit  
12 east of Cambridge, by the time I got out there  
13 and was talking to the guys.

14 Q. By the time you got there, the clearing  
15 behind --

16 A. Cambridge.

17 Q. Was done?

18 A. Was done, and was done -- I shouldn't say --  
19 they were still -- it was basically done, but  
20 there was some little further clean up and things  
21 like that. But they had already gone through  
22 there, and the bulk of the trees were out of  
23 there before I ever got out, you know, on the  
24 site and talked to anybody.

25 Q. Did you take any pictures on that occasion?

1 A. Yeah, I took some -- I think we took  
2 pictures then, we took pictures of --

3 Q. Who took pictures?

4 A. I took pictures, my son took pictures.

5 Q. Where are those pictures?

6 A. Between my house and my son's house, and  
7 some of them we turned over to Marv.

8 Q. Are they digital or film?

9 A. Digital.

10 Q. How many pictures were taken?

11 A. Well, at the outset we took, I would guess,  
12 you know, a dozen pictures, but we probably have  
13 taken, you know, dozens of pictures since then.

14 Q. And all of them are still available?

15 A. I don't know. Not all of them. I was just  
16 looking over myself. I have to really go back  
17 and look and see how much I could -- I went and  
18 seen some of my computer stuff and that. But I  
19 think between the three of us, we got most of  
20 them available, yes.

21 MR. BAHRET: Do you need a formal  
22 request, Marv, to get all of the photos?

23 MR. ROBON: No. He has been looking  
24 for them for me. I wanted a picture of the  
25 machine.

1 Q. Did you take a picture of the machine?

2 A. Yeah, but I couldn't find it.

3 Q. When did you take the picture?

4 A. When they -- it was before they moved the  
5 equipment off site. There was a couple of major  
6 pieces of equipment from Edwards Land Clearing  
7 that I took pictures of.

8 Q. Did you take any pictures of the machinery  
9 in operation?

10 A. No, they were done by the time I took the  
11 pictures.

12 Q. So obviously no videotape taken of the  
13 machinery either then?

14 A. No.

15 Q. What was the problem identified on that  
16 first day other than some vegetation is now gone?

17 A. Well, it appeared they were on the  
18 development property as well, that they had  
19 trespassed as well as cleared, and --

20 Q. How did you make the determination that this  
21 machinery had been on development property?

22 A. Well, along this particular place by my  
23 son's house, there was an old wall that was a  
24 railroad tie wall. And we knew because we had  
25 our monuments real close to my son's place, we

1           could see --

2           Q.   What do you mean we had our monuments there?

3           A.   The development monuments that Peterman put  
4           in. They put corner monuments on, which are  
5           fairly recent. We still had them there, and we  
6           could just sighting down, we could see that the  
7           clearing was several -- on the land was several  
8           feet onto Jack's land just sighting down the  
9           monuments before we brought Peterman in to  
10          confirm it.

11                       Plus the trees were 20 feet on Jack's  
12          property, the way they grew, actually growing in  
13          on his property. These were big, these were  
14          giant trees. I mean, you know, we have pictures  
15          of them. I don't remember all the diameters.

16          Q.   I'm not sure what you're telling me. You're  
17          telling me a tree was removed that was 20 feet  
18          into the development?

19          A.   It grew 20 feet into the development, the  
20          branches and that, yes.

21          Q.   Are you claiming the trunk was 20 feet in?

22          A.   No, no.

23          Q.   Are you claiming the trunk was on the  
24          development at all?

25          A.   Yes, oh, yeah, there was a lot of them. It



1 was apparent right from the start without  
2 surveying.

3 Q. Were there survey stakes out there, or I  
4 forget the term, laths, were there survey laths  
5 out there?

6 A. No, the corners are monuments. They're set  
7 in concrete on a pipe.

8 Q. I'm not asking about the monument. I'm  
9 asking if there were any survey stakes or laths?

10 A. No, there wasn't anything there.

11 MR. ROBON: Wait for a question.

12 Q. Did you see any indications of survey laths  
13 or stakes anywhere along this railroad  
14 right-of-way?

15 A. There weren't any at the time. I don't  
16 really recall as far as lath. I do recall there  
17 were some markings that the City surveyors, I  
18 believe it was the City surveyors they told me  
19 later anyways, they had gone and painted little  
20 marks in the trees to tell the clearing equipment  
21 where to go. And that was -- there was some of  
22 them still there.

23 Q. They painted trees?

24 A. Yeah, they spray paint the -- in clearing  
25 operations, they usually spray paint here and

1       there to keep -- whatever marks they have removed  
2       when they're clearing, they spray paint every 20  
3       feet or something. They just --

4       Q. The sprayed item is to mark a boundary or  
5       what?

6       A. Yeah, to tell them where to stop clearing.

7       Q. Were those painted markings still around?

8       A. There was still some of them around, yes; I  
9       could see them.

10      Q. Were they on the railroad right-of-way?

11      A. They were right along the line, but you  
12      couldn't tell because even then when you're  
13      spraying a branch like that, you can't really  
14      establish it went a few feet, you know, where  
15      they meant to go because the clearing, they've  
16      already pulled all the trees and stuff out of  
17      there, so that was highly disturbed. That was  
18      the only markings that I saw at the time.

19      Q. Did you see any markings that you believed  
20      were on the development property?

21      A. No, none of these things were -- the ones  
22      that were there were not. They weren't even --  
23      they were down at the very end of the property  
24      where it had already been cleared. It didn't  
25      make any appearance that there was --

1 Q. Whatever markings you saw were on the  
2 railroad right-of-way?

3 A. It was along the boundary. I couldn't tell  
4 you whether it was on their property or ours, but  
5 it was near the boundary.

6 Q. You didn't see any of these painted markings  
7 that you can tell us were on the Old Granite  
8 property?

9 A. No, I can't.

10 Q. Did you ever talk to anybody that was using  
11 this land-clearing equipment?

12 A. No, not anybody that was using it.

13 Q. Did you talk to anybody that claimed they  
14 had used it?

15 A. I think all their people were where -- I  
16 think all their people were -- when I first saw  
17 the -- went out there, the basic operation they  
18 were either done with or they just had a little  
19 clearing up. I didn't talk to any of the  
20 land-clearing guys themselves. I think I talked  
21 to the low-boy operator or something was picking  
22 up the equipment and taking it away. That was  
23 the only guy I think I talked to.

24 Q. So the answer is no, you did not talk to  
25 anybody that either used the equipment or claimed

1 to have used the equipment?

2 A. Right, that's true.

3 Q. Did you ever talk to anybody for the City of  
4 Toledo other than these people that you believed  
5 were the survey crew?

6 A. Then or later or what?

7 Q. Let's -- at the beginning, you talked to a  
8 survey crew?

9 A. Right.

10 Q. And how long after this clearing was that?

11 A. That was later, too. That was not at that  
12 time. The survey crew didn't come out till quite  
13 a bit later.

14 Q. About when did you believe this survey crew  
15 came out and you had conversation with them?

16 A. That was in the April timeframe.

17 Q. Besides the survey crew, who have you  
18 communicated with on behalf of the City of  
19 Toledo?

20 A. This is all later because --

21 Q. Right.

22 A. At first we didn't.

23 Q. I understand. Just give me the names.

24 A. I spoke with -- her name is Christy  
25 Soncrant, their engineer. I spoke with several

1 people in the City. I spoke with the survey  
2 chief. It's a survey chief from the City of  
3 Toledo that was in charge of it, the people I  
4 talked to. Their surveyors, which spoke to their  
5 inspector, Joe Crandall, and particularly their  
6 survey personnel.

7 Q. When did you first have contact with Joe  
8 Crandall?

9 A. I think the first time I had any contact  
10 with him was when -- probably when the surveyors  
11 came out in the April timeframe. I say April  
12 timeframe. I mean, it might have been a week or  
13 so into May. It may have been even --

14 Q. Was that your only contact with him?

15 A. No. I saw him there several times through  
16 the course of this thing.

17 Q. What were you discussing with him? What  
18 were the topics?

19 A. Well, the surveying, and he was involved  
20 with like, oh, he wanted me to make sure I wore a  
21 hardhat and that kind of thing. But, you know, I  
22 asked him himself, you know, what was going on  
23 here. Why did they have to come over on our, you  
24 know, development property, and, you know, those  
25 kind of things.

1                   But I talked to him. He had  
2                   something, you know, like an inspector on a job,  
3                   he kind of like coordinates the surveying thing,  
4                   too, and so we talked about the surveys, you  
5                   know.

6                   And later on when they were building  
7                   the water main, we talked a couple of times  
8                   about, you know, why they were regrading it the  
9                   way they were. I think I talked to him about the  
10                  drainage manhole that we were concerned about,  
11                  why they were knocking that manhole cover, and  
12                  the system that we relied on for draining  
13                  Cambridge, why they were knocking that -- why he  
14                  was letting the contractor knock that thing to  
15                  hell.

16                Q. What was that manhole that you're talking  
17                about that you claim Cambridge relied upon?

18                A. That's 30 feet from Cambridge to the east.

19                Q. Upon what information do you rely upon to  
20                claim that it's part of the drainage plan for  
21                Cambridge?

22                A. Well, I spoke with the county engineer and  
23                the drainage engineer.

24                Q. Did you review the drainage plan for  
25                Cambridge?

1 A. Yes.

2 Q. Then you're aware of the fact that Cambridge  
3 does not rely upon any drainage ditches or  
4 manholes that are --

5 A. That's not true.

6 Q. It is according to the plan they filed.

7 A. No, it isn't. That's -- the City thinks  
8 that, but the City doesn't understand it.

9 Q. Mr. Robon asked some questions at a  
10 deposition of Glen Anger or Agner --

11 A. Agner, yeah.

12 Q. -- suggesting that the drainage plan for  
13 Cambridge is a linear flow of water from the side  
14 of Cambridge closest to Hospice down the other  
15 way towards Bates Road. Do you agree with that?

16 A. That the water from where?

17 Q. That the flow of water is intended to go  
18 behind Cambridge at the back of the lots?

19 A. Right.

20 Q. In one smooth direction from one end to the  
21 other, basically from Hospice down towards Bates  
22 Road?

23 A. That's right.

24 MR. ROBON: Objection to the word  
25 smooth. I'm not sure what that means.

1 Q. Are you aware of the fact that the drainage  
2 plan actually has water going in both directions?

3 A. The drainage plan of what?

4 Q. The drainage plan filed by Old Granite and  
5 submitted to the County?

6 A. Our drainage plan has the drainage in the  
7 back. We have our own drainage system in the  
8 back, right? And in designing that system, they  
9 went and relied on that water passing in the back  
10 to that manhole. We only took a portion of that  
11 water, okay?

12 Q. What document do you have that shows that  
13 Old Granite relied upon any drainage ditches or  
14 pipes or manholes that weren't on Old Granite  
15 property?

16 A. I spoke to the engineer that designed it.

17 Q. Who is that?

18 A. Todd Perkins -- or Jenkins.

19 Q. Todd Jenkins?

20 A. Yes.

21 Q. Is he a Peterman employee?

22 A. Uh-huh.

23 Q. Yes?

24 A. Uh-huh.

25 Q. Yes?



1 A. Yes, I'm sorry.

2 Q. Did he show you a document that shows that  
3 they were relying upon anything that wasn't on  
4 Old Granite property?

5 A. No. There wouldn't be -- there normally  
6 isn't such a document, but he and I went over in  
7 detail because I know how I've done some  
8 development design myself like this --

9 Q. The answer is no, he didn't show you a  
10 document?

11 A. No, he did not show -- he didn't have --  
12 there was no document.

13 Q. You're unaware of any document that would  
14 show that Old Granite was relying upon drainage  
15 of any kind that wasn't even on their property,  
16 any pipes, ditches or any other method of  
17 removing water? You can answer with a yes or a  
18 no. Either you are aware of a document or you're  
19 not.

20 A. Well, I'm not sure it's either one because  
21 he told me that they had done the drainage  
22 review, and I would think, and maybe he had me to  
23 understand that there was some other documents  
24 developed that would have those calculations to  
25 show all the drainage that was going by Cambridge

1 and what portion we were taking away. He may  
2 have that. Now, I don't -- but to me, I'm not  
3 aware of --

4 Q. I haven't seen any such document, and the  
5 question to you is, have you seen such a  
6 document?

7 A. No.

8 Q. I'm not asking you to --

9 A. I haven't seen that document, but I --

10 Q. All right, because you understand I'm not  
11 asking you to speculate as to whatever Todd  
12 Jenkins may have seen or not seen, okay? I just  
13 want to know what you've seen. And we agree that  
14 neither one of us have seen any document?

15 A. That's true.

16 Q. When did you first become aware of any  
17 problem with flooding on the Old Granite  
18 property?

19 A. During the construction we became aware of  
20 it. Physically aware of it are you talking  
21 about?

22 Q. I don't know how else you would be aware of  
23 it.

24 A. Well, we were doing the engineering review  
25 of the thing with him, so that's what I was going

1 on. But as far as the real flooding problem, we  
2 became aware of it when it was obvious that --  
3 right after they cut the main drainage pipe  
4 underneath the railroad there.

5 And I was trying to explain to Christy  
6 Soncrant. Even before this, I was trying to  
7 explain to her you can't cut that pipe, but, you  
8 know, when they did cut the pipe, they started  
9 pumping, and -- down by Bates Road. That water  
10 was coming backwards to Cambridge all the way  
11 from Bates Road coming into our system at  
12 Cambridge.

13 And I called her and Joe Crandall came  
14 out, and I think she came out, too, you know, and  
15 said, "Oh, that's just a temporary thing. We were  
16 just" -- and I said, "Isn't this some kind of  
17 proof that you shouldn't have cut that pipe in  
18 there?"

19 But we saw it then, and then we had a  
20 pretty decent rain, and the rain, at least  
21 according to Lori, and Lori is my son's wife, she  
22 called me up, said, "Hey, we got this ponding in  
23 the back of the house now."

24 Q. Is that after the nine inches of rain one  
25 day followed by eight inches two days later? Is

1 that the rainfall you're talking about?

2 A. We never had that.

3 Q. Yes, we did.

4 A. No, we didn't. That was in Findlay.

5 Q. You don't know what the official numbers  
6 were for Toledo area then?

7 A. Official?

8 Q. Yeah.

9 A. There probably is no official at Cambridge,  
10 but, you know, we knew it was the most we had one  
11 night was three inches in that area in Perrysburg  
12 from the gauges that we had.

13 Q. You're telling me that at Toledo Express  
14 Airport they get nine inches and in Perrysburg  
15 they only got three?

16 A. You're saying they got nine inches at Toledo  
17 Express Airport?

18 Q. Yes, I am.

19 A. In 2006?

20 Q. Yes.

21 A. Overnight?

22 Q. Yes, Sylvania Country Club went almost under  
23 water.

24 A. Well, the most we got was three and a half  
25 in Perrysburg.

1 Q. How do you know?

2 A. From our gauges.

3 MR. ROBON: Can we talk about a  
4 time? We said in '06, but is this in the winter  
5 or spring, fall, summer? Let Mr. Bahret -- Jack,  
6 you can't say anything. You can't say anything.

7 Q. How do you know what the official rainfall  
8 was in Perrysburg?

9 A. Well, I have a rain gauge.

10 Q. Do you record that data?

11 A. No, I just look at it, and we have golf  
12 courses. I'm a golfer too. We are kind of very  
13 sensitive to what the difference was between  
14 Findlay and Perrysburg. But, to my  
15 understanding, even though we don't have the  
16 official numbers, the most we got in any night  
17 was around three inches.

18 Q. Are you aware of the fact that the flooding  
19 in Findlay was in the year 2007? I mean, are you  
20 thinking of the right year?

21 A. Yeah, I mean that's the one we have been  
22 comparing everything to is this major flood.

23 Q. No, I'm talking about the summer of 2006,  
24 the rainfall. You're telling me in the summer of  
25 2006?

1 A. Summer of 2006, my understanding was there  
2 was nothing more than around three inches in that  
3 area.

4 Q. Okay. And that understanding is based on  
5 you looking at your rain gauge?

6 A. And from other reports at our golf courses.

7 Q. Regardless of our respective golf courses, I  
8 heard you say that you said something to Christy  
9 Soncrant before a pipe was cut?

10 A. Right.

11 Q. When did that conversation take place?

12 A. That would have been in the summer of --  
13 that would have been in 2006, probably a month or  
14 two before they cut it.

15 Q. And how did you become aware of the fact  
16 that there was even a pipe there?

17 A. When we were out there looking at the  
18 clearing, we went and noticed that it was a new  
19 manhole cover top knocked off by the clearing  
20 equipment and dirt pushed down in the manhole.  
21 And I complained about that to Christy and that.  
22 But that was -- when I did that, when I looked  
23 and saw that that manhole was knocked over, I'm  
24 wondering, you know.

25 Q. When you say it was knocked over, you mean

1 the lid was knocked off?

2 A. No, this was a clay pipe manhole about  
3 30-inch diameter, and the top section, which was  
4 probably about two or three-foot, probably about  
5 a three-foot pipe with a bell on it, that the  
6 cover sits on, that had been knocked over.

7 Well, she came, and I said, "Oh,  
8 Ric-Man said that they didn't -- it was already  
9 messed up." And I said, "Well, you know, this is  
10 fresh dirt that's just been pushed in there and  
11 that."

12 So any rate, that's when I first  
13 became aware that there was a manhole there. And  
14 I went and I asked the neighbor whose property it  
15 sits next to, I asked the neighbor, I said, "What  
16 is this pipe here?" And the guy whose been  
17 living there all his life --

18 Q. Do you know this person's name?

19 A. Yeah. Well, the property is the Gillette  
20 property. I have his name at home. This is Mrs.  
21 Gillette's son-in-law who takes care of the  
22 property.

23 And he says, he told me, he says, "Oh,  
24 no." He said, "That's the main drain before you  
25 got here with the development, you know, that's

1 the main drain all the way from Bates all the way  
2 up to W.W. Knight and Hospice. It drains that  
3 whole area. It comes all the way down here. It  
4 even flooded all the way up to the top of the  
5 railroad tracks when they didn't take care of  
6 that thing once." And I'm like -- okay, but  
7 that's how I found out that this --

8 Q. To the top of the railroad tracks would be  
9 at least 10 or 12 feet, wouldn't it?

10 A. About seven right there. And he explained  
11 how they had this big flood there and that that  
12 was -- that they had to clean out this -- he was  
13 complaining that the railroad never maintained  
14 that darn thing.

15 Q. When did this big flood that this guy is  
16 talking about occur?

17 A. He was talking about in the neighborhood of  
18 1985 or something like that. And he said that he  
19 had -- because the railroad neglected it, he had  
20 to go and maintain it and clean it sometimes.

21 Q. Clean what?

22 A. The manhole out and make sure that that pipe  
23 worked; otherwise, his property got flooded. So  
24 that was when I first came to realize that  
25 this -- what this manhole was and what this pipe



1       that connected to it going underneath the  
2       railroad and why, you know, Cambridge relied on  
3       that pipe for the overflow from our system when  
4       we had heavy rains.

5               So that's how I got to know, and it  
6       was kind of confirmed that this thing wasn't just  
7       some old thing hanging in there. I was trying to  
8       get her to, Christy and them to make sure you  
9       take care of the -- put the cover back on so this  
10      thing doesn't get screwed up because we need this  
11      thing for Cambridge, this guy and Hospice and the  
12      rest of us. That's the only drain for a whole  
13      mile.

14      Q. You're saying all of this before anybody cut  
15      the pipe?

16      A. Right.

17      Q. By the way, do you know, did you ever see  
18      that manhole cover? I think you already said you  
19      didn't. But had you ever seen it before you are  
20      walking by and you notice that it's knocked off?

21      A. I think I did see it before it was knocked  
22      off.

23      Q. How would you have had the opportunity to  
24      see it before?

25      A. Before they went and -- because what they

1 did, they cleared and then they graded everything  
2 off. They went and came with a bulldozer and  
3 pushed the dirt all the way over on our edge and  
4 into the ditch and everything, you know, slightly  
5 into the ditch and built up the bank.

6 And that's when I saw how much, you  
7 know, that the dirt was actually pushed in there  
8 and why we were arguing over -- "Hey, I don't say  
9 that this thing was in great shape before Ric-Man  
10 ever got there, or Vermillion or any of them," I  
11 said.

12 But I had seen the thing, and it was  
13 -- I didn't take a real good look at it because  
14 it was all grown up still around there before  
15 they bulldozed it. But I had seen it before I  
16 actually had Christy and those people out there.

17 Q. Let me see if I can understand what you're  
18 saying. You never saw this manhole before the  
19 clearing machine was used, correct?

20 A. Yes, I think that's true.

21 Q. But you're telling me you saw it after a  
22 clearing machine was used but before a bulldozer  
23 was used?

24 A. Yes, that's right.

25 Q. And you took pictures at that point?

1 A. I didn't take early pictures, but I think we  
2 did take pictures of the dirt going down in the  
3 manhole because I thought that was pretty bad for  
4 them to --

5 Q. But that's after the bulldozer, right?

6 A. Right, that was after the bulldozer.

7 Q. Did you take pictures before the bulldozer,  
8 but after the clearing operation? I thought you  
9 said earlier you and your son took pictures your  
10 very first time out there?

11 A. Yeah, and I'm not sure that we -- I really  
12 don't recall whether we took pictures then or  
13 not; may have.

14 Q. You haven't deleted any pictures that you  
15 took in the Old Granite area, have you?

16 A. I hope not.

17 Q. Have you checked with your son to see if he  
18 still has the pictures he took?

19 A. I asked him generally, and he says he's got  
20 some photos too. But we just -- Marv was asking  
21 me, too. We just haven't recently gone through  
22 and see what we really do have, you know.

23 Q. And you said you took pictures in this  
24 manhole?

25 A. Of the manhole. Not in it, but, you know,

1 standing right above it showing the dirt going  
2 down in it.

3 Q. Did you ever measure how far down the  
4 manhole goes?

5 A. Huh-uh.

6 Q. How far down does it go?

7 A. As I recall, we had -- the pipe is down --  
8 from the lid it's down about 12 feet. I think  
9 the invert, you know, the bottom of that pipe I  
10 think it was 12-1/2 feet.

11 Q. Now, did you know where the pipe went in  
12 this manhole when you looked in it?

13 A. Yes, when we -- and I don't remember whether  
14 it was -- probably when the bulldozer --

15 MR. ROBON: Can we clarify one  
16 thing, Bob? Which pipe because there is more  
17 that one pipe in the manhole.

18 Q. Did you know where any pipes went?

19 A. Yes, I knew where all the pipes went.

20 Q. At what point did you know that?

21 A. Probably after the bulldozer went through.  
22 At that point we went and checked out where all  
23 the -- there are two inlet pipes to it and the  
24 one main outlet pipe that goes to the center  
25 ditch of the railroad.

1                   And that was still visible. We could  
2                   still see where that came out to the center  
3                   ditch, plus where the two inlet pipes came from  
4                   on the Cambridge side.

5                   Q. And the center ditch you're talking about is  
6                   between the two railroad right-of-ways there's a  
7                   ditch?

8                   A. Right.

9                   Q. And, as you called it, an outlet pipe that's  
10                  visible?

11                  A. Yeah, that's -- outlet from that manhole to  
12                  that ditch.

13                  Q. That's visible?

14                  A. It was visible.

15                  Q. Is it visible now?

16                  A. No. No, they tore the -- I understand they  
17                  tore the whole thing out. We couldn't see it  
18                  after they went and tore --

19                  Q. Do you have any pictures of the outlet pipe?

20                  A. I don't know.

21                  Q. Do you have any recollection of taking any  
22                  picturing of the outlet pipe?

23                  A. I think so. I think we did take pictures of  
24                  that outlet pipe.

25                  Q. Did you ever have any discussion with

1 anybody on behalf of the City of Toledo about the  
2 outlet pipe?

3 A. Yes.

4 Q. Who?

5 A. Christy.

6 Q. What was the height of that outlet pipe  
7 below the grade of the railroad right-of-way?

8 MR. ROBON: In which part? Are you  
9 talking about the tracks or the --

10 A. The main pipe going under?

11 MR. BAHRET: There were no tracks.

12 MR. ROBON: The tracks are next to  
13 it.

14 A. Underneath it it's -- well, that's what I  
15 was saying, that 12-1/2 feet, that was, that  
16 manhole top is almost to the top of the railroad.  
17 So that was about -- that pipe was down there,  
18 the invert, the bottom of it was down there about  
19 13 feet below the surface.

20 Q. How deep is the ditch between the railroads?

21 A. That was the same -- that thing was right  
22 down at the bottom of that ditch.

23 Q. The ditch between the railroads is 12, 13  
24 feet deep?

25 A. Uh-huh.

1 Q. Yes?

2 A. Yes. At that point right down there, yes.

3 Q. How deep is that ditch now?

4 MR. ROBON: If you know.

5 MR. BAHRET: Marv, you don't have to  
6 keep telling him the hints that he should say he  
7 doesn't know. He is a smart enough guy; he knows  
8 the rules. You don't have to coach him.

9 A. Right now it's eight to ten feet.

10 Q. You were telling me there's two inlet pipes  
11 to that manhole?

12 A. Right.

13 Q. Where did they come from?

14 A. One came from the Gillette property and one  
15 came from Cambridge.

16 Q. From Cambridge?

17 A. Uh-huh.

18 Q. That's a yes?

19 A. Yes.

20 Q. It was on Cambridge property?

21 A. Uh-huh.

22 Q. That's a yes?

23 A. Yes.

24 Q. Where on Cambridge did the pipe originate?

25 A. I believe it's on Lot 13.

1 Q. What is the form of the origination? Is it  
2 a manhole or cistern or what do we got?

3 A. No. All it is, it's just an open railroad  
4 pipe. It's a 12-inch clay pipe, and it's right  
5 on the edge. That was right at the ditch that's  
6 on the side of Cambridge. All that water from  
7 Hospice and that went into that pipe, collected  
8 there.

9 Q. Is it in the ditch?

10 A. Yes, at the end of the ditch. The ditch  
11 comes from Hospice, goes to this pipe, and it  
12 goes underground past Lot 15 and 16 and down.

13 Q. Is any part of that ditch on Cambridge  
14 property?

15 A. The pipe is not. The pipe is just inside --  
16 is on the railroad property by a foot or two.  
17 And the ditch -- but the ditch, there is a little  
18 swale there. That is on -- you know, the ditch  
19 is a little bit on Cambridge property, a little  
20 bit on -- most of the ditch, the high-bank ditch,  
21 is up on CSX property.

22 Q. So one of these pipes came from -- I forget  
23 the name you gave me.

24 A. Gillette.

25 Q. Gillette?



1 A. Yeah, that's --

2 Q. How long was the run of that pipe?

3 A. That one was -- I think that one was a  
4 couple hundred feet, and the one from Cambridge  
5 was like 250, 300.

6 Q. Was there a ditch behind Old Granite, or did  
7 the ditch end before Old Granite?

8 A. Half of Old Granite had a ditch, half of it  
9 had -- 300 feet of it had this pipe, okay? From  
10 what I could gather, the railroad must not have  
11 had enough property or something. They tried to  
12 squeeze it in.

13 Rather than have a ditch, they put it  
14 in a pipe the last 300 feet before it went into  
15 this manhole. That's why they had a little  
16 railroad tie wall along that property line, too,  
17 and just inside that was this pipe.

18 Q. How would water drain from Old Granite into  
19 this pipe then?

20 A. It's -- most of Old Granite up above, you  
21 know, all those other lots with the backyards  
22 would go into that pipe. You know, that was very  
23 close to -- it's deeper than -- it's deeper  
24 than --

25 Q. Certainly Lots 15 and 16 wouldn't drain to

1       that pipe, would they?

2       A. No, they wouldn't go to that pipe,  
3       especially now with our own system in there.

4       Q. Let me change topics for a minute and get  
5       back to the discussions about cutting the pipe.

6       Were you there when the pipe was cut?

7       A. No, I wasn't.

8       Q. Were you ever there before it was cut when  
9       anybody, any officials from Wood County were  
10      there?

11      A. Yes.

12      Q. And who was there?

13      A. I had asked -- again, I asked for the  
14      meeting. We had Christy Soncrant came out, Ray  
15      Huber was there. Ric-Man's superintendent was  
16      there, I can't remember his name, and I think it  
17      was the four of us.

18                      And we were trying to go, and the  
19      whole idea was to try to figure out what the heck  
20      was with this pipe underneath the railroad, and  
21      this is before it was cut. And --

22      Q. Anybody identify what the reason the pipe  
23      was there?

24      A. Yeah. Ray Huber, the county engineer, he  
25      told me and Christy that he was a former Toledo

1 Terminal employee, and he dug up this map showing  
2 that there was a drain pipe in there.

3 Q. Was this before or after it was cut?

4 A. Before. So Ray's like, "Hey, you know, this  
5 is your project, City of Toledo. Here's all I  
6 could come up with." And he is telling me, you  
7 know, "I don't know how good it is or what it" --  
8 but he says, "This shows the culvert." And  
9 that's what it calls it on this little drawing  
10 which the county has. Later on we found the  
11 County had all along on file. They had the  
12 railroad drawings and everything. And it was,  
13 you know, it was right there.

14 Q. It shows a culvert?

15 A. Yes, it shows a culvert, a 24-inch culvert.  
16 It calls it a culvert. A culvert is usually a  
17 main drainage pipe.

18 Q. Isn't a culvert like a ditch?

19 A. No, but the railroad call them culverts  
20 pipe, too. As a matter of fact, they call it a  
21 VCP, which is a vitrified clay pipe culvert,  
22 which was what it was. This was a clay pipe, and  
23 the manhole was a clay.

24 The thing is 90 years old or whatever,  
25 but it's still -- the old railroad, they had the

1 thing in there, and they had it at the right  
2 depth and everything to drain that whole side of  
3 the railroad thing.

4 So I thought it was clear to Christy  
5 right then that, you know, "Here's the guy  
6 confirming here it is. Why the hell didn't you  
7 have your consultants knowing this thing was  
8 here?"

9 We were also talking about the  
10 manhole, knocking that over, and the disrespect  
11 to that. Never really -- couldn't believe that  
12 they would actually cut the thing, you know.

13 But any rate, we did have real clear  
14 ahead of time that we knew it was there, you  
15 know, and that --

16 MR. ROBON: Let him ask the  
17 question.

18 Q. Did anybody say it served any function?

19 A. I did.

20 Q. Did anybody other than you say that it  
21 served any useful function?

22 A. No. This is when Ray was like, "Hey, I'm  
23 just bringing out this drawing. I don't know  
24 which way it goes. I don't know."

25 Q. Did anybody say it was even open?

1 A. No. At this point we didn't know.

2 Q. Were you there at any time after that thing  
3 was cut to look into what was left of the pipe?

4 A. Just in the manhole, I saw what, you know,  
5 what the --

6 Q. Do you know if the pipe itself, this VCP  
7 culvert, was it totally plugged?

8 A. No, it wasn't totally plugged, at least at  
9 the manhole it was not, which usually means  
10 it's -- whatever is there is usually what it is  
11 in the pipe.

12 Q. Did you see any section of the pipe to  
13 verify what you just told me?

14 A. No, I never saw any of the -- other than the  
15 -- I saw the pipe at both ends, and, you know, it  
16 confirmed there's probably half or two-thirds  
17 full of the sediment from the railroad not taking  
18 care of it.

19 Q. Are you claiming that there are wetlands at  
20 any point on the Old Granite subdivision?

21 MR. ROBON: I'm going to object. I  
22 think that gets to opinion testimony. And if you  
23 want to ask him opinions, I think that's fine.

24 MR. BAHRET: I don't think it's an  
25 opinion. I'm asking if he claims there are

1 wetlands there.

2 MR. ROBON: No, that's an opinion.  
3 I don't think that's a fact question.

4 MR. BAHRET: You don't think the  
5 existence of a wetland is a fact?

6 MR. ROBON: I don't think the  
7 common person could look at a piece of property  
8 and say whether it is or is not a wetlands. I  
9 think a professional could.

10 MR. BAHRET: Okay. I'll pay him the  
11 same hourly rate as he gets paid.

12 MR. ROBON: Can we stipulate we'll  
13 let the Court decide what he should get paid?

14 MR. BAHRET: If he should be paid.

15 MR. ROBON: Right. Go ahead and  
16 answer.

17 Q. Are you claiming there are wetlands behind  
18 Old Granite?

19 A. Behind it or on it?

20 Q. On it or behind it?

21 A. I asked our wetlands guy to come out and  
22 look at it, and -- Gary Buck.

23 Q. Who is Gary Buck?

24 A. Gary Buck is a -- he is a regulatory  
25 investigator for the Corps, retired, who I worked

1 with in Point Place. He claims that that's, the  
2 railroad property itself, not the farm that Jack  
3 bought because that was farm. You can develop  
4 that, but that the railroad letting those trees  
5 grow up, that that is truly a wetland, that whole  
6 embankment. Once they let those trees grow up  
7 the years that they did, that his opinion was  
8 that that would be clearly a valuable wetland.

9 Q. Did he see it before the trees were cut  
10 down?

11 A. No, he didn't.

12 Q. Did he see it at all?

13 A. He was out there and he saw aerial photos.

14 Q. Did you have an opinion one way or another,  
15 or are you just telling us what this other guy's  
16 opinion is?

17 A. I'm really relying on him. My work in the  
18 Corps was not a wetlands guy.

19 MR. BAHRET: There goes your request  
20 for fees, Marv. He doesn't have an opinion.

21 Q. Did you pull any kind of permit to --

22 MR. ROBON: He does have an  
23 opinion, but it's based upon somebody else's  
24 consultation.

25 MR. BAHRET: He just told me he

1 doesn't have an opinion, Marv.

2 Q. Did you pull any kind of permits to do any  
3 work behind Old Granite after the trees were cut  
4 down?

5 A. You mean like wetland permits?

6 Q. Yeah. Did you -- somebody was putting dirt  
7 in there; is that correct?

8 A. In the wetlands area or on the embankment or  
9 what are you talking about?

10 Q. Did anybody move any dirt after the City had  
11 the trees and vegetation cut down on the  
12 railroad?

13 A. Yeah, the City did or their contractors did.

14 Q. They moved dirt?

15 A. Yeah.

16 Q. My understanding is that Old Granite moved  
17 dirt. Do you have any understanding on that  
18 issue?

19 A. No, not on the railroad property. We moved  
20 it on the Cambridge property. We started a  
21 mound.

22 Q. Did anybody pull a permit to build the  
23 mound?

24 A. It wouldn't be necessary.

25 Q. Why would it not be necessary?



1 A. It's farmland. It's been farmland forever,  
2 and you don't need a permit for that. The trees  
3 weren't growing up on it. It's only if the trees  
4 have grown up that these things return back to  
5 wetlands is the real issue.

6 Q. Your understanding is the wetlands then were  
7 not on old Cambridge property?

8 A. Right.

9 Q. So if whatever your friend claims was a  
10 wetland, if trees were removed, that wasn't done  
11 on Old Granite property?

12 A. Right.

13 Q. I'm assuming you don't have an understanding  
14 as to the definition of a wetland, the legal  
15 definition?

16 A. No, I'd leave that to --

17 Q. You'd leave that to --

18 A. Gary.

19 Q. Gary?

20 A. That's his bag.

21 Q. Did you ever walk on that railroad  
22 right-of-way before it was cleared?

23 A. Probably not.

24 Q. Do you have any knowledge of any trees back  
25 there, weeping willow trees or anything of that

1 nature?

2 A. On the actual railroad itself?

3 Q. Not on the railroad itself, but on their  
4 right-of-way.

5 A. On their right-of-way?

6 Q. Yeah.

7 A. No, I don't have any direct knowledge, just  
8 photos and that kind of thing.

9 Q. Did you see anything in the photos that you  
10 were shown that would indicate there were any  
11 trees commonly associated with wet areas, such as  
12 a weeping willow tree?

13 A. All the trees were. They're all, I mean,  
14 according to Gary, you know, this is the way it  
15 goes. You had the farmland there.

16 Q. If I should talk to Gary, I guess I will,  
17 and I'm not an expert, but I've never heard  
18 anybody claim that oak trees and things like that  
19 are ever in wetlands?

20 A. Is that right?

21 Q. Yeah, I've never heard that.

22 A. Well, that's not so. I know that much.

23 There are certain types of oaks that are  
24 definitely wetland trees, and that's what we have  
25 back there.

1 MR. ROBON: Pin oaks.

2 Q. Did you ever measure how deep the area was  
3 behind Old Granite, between Old Granite and the  
4 railroad, as far as the depth of any vegetation?  
5 Not the height, the depth?

6 A. The width?

7 Q. Width.

8 A. Coming out.

9 Q. I was trying to avoid using width because to  
10 me that means side to side, you know, behind the  
11 development. There is a measure that you can put  
12 on whatever was there allegedly as vegetation  
13 from the back of Old Granite walking straight to  
14 the railroad track or the railroad right-of-way.  
15 Are you following me on that?

16 A. Right. And you're wondering about like the  
17 trees that were growing out over Cambridge  
18 property?

19 Q. No, not --

20 A. That distance?

21 Q. No. At ground level, what's the depth, the  
22 measure of how thick any of this vegetation was  
23 between Old Granite and the railroad right-of-way  
24 that was cleared?

25 A. Oh, oh, okay. You mean like -- well, let me

1 kind of answer it this way, if I understand it  
2 right. The right-of-way is 68 feet and, even  
3 though I didn't see, you know, I didn't go out  
4 there specifically and see this, I had been there  
5 before it was torn down.

6 You know, the year before I had been  
7 out there, but never really looking at it like  
8 maybe Jack or somebody would that was developing  
9 the property. I'm just visiting my son.

10 But what appears from what little I  
11 saw, and aerials we saw that were there in 2005,  
12 the growth that had come up, I think what you're  
13 getting at is that there was 68 feet of  
14 right-of-way. The trees were heaviest on the  
15 edges, and the trees grew out 10, 15, 20 feet out  
16 to either side.

17 So you got 68, plus you've got another  
18 say 10 or 15 feet. You've got about a hundred  
19 feet of vegetation that was there that would have  
20 kept you from viewing those trains.

21 Q. I'm not following you at all. A hundred  
22 feet of vegetation between, let's say, Lot 15  
23 and --

24 A. The active railroad.

25 Q. The area where the railroad tracks used to

1 be for the Toledo Terminal, was that already  
2 cleared, or were there trees there?

3 A. There was trees there over the whole thing.

4 Q. You're not claiming there was a hundred feet  
5 of vegetation on Old Granite's property?

6 A. No, no, no. Old Granite was basically a  
7 farmland; it was cleared. There was a couple of  
8 trees that were there. They're grown up,  
9 whatever, but that was basically cleared. This  
10 hundred feet of vegetation was between --

11 Q. It was on railroad property?

12 A. On railroad property that was cut down.

13 Q. And are you claiming that there was a  
14 hundred feet of vegetation across the whole back  
15 side of Old Granite or just in spots?

16 A. No, the whole thing was that. The aerial  
17 photos prove that, too.

18 Q. Not the ones I've seen, but if you're saying  
19 the ones you've seen show that?

20 A. Right.

21 Q. There were no gaps in the development of  
22 sight line to the railroad?

23 A. No, there was no gaps; it was solid.

24 Q. Did you know there was a railroad there  
25 before the clearing was done by the City of

1 Toledo's contractor?

2 A. Uh-huh.

3 Q. Yes?

4 A. Yes.

5 Q. How did you know?

6 A. We have been involved with that railroad  
7 before, and as far as permits and stuff like  
8 that, Gary Buck and I, and we knew from way back  
9 when kind of the history of the old Toledo  
10 Terminal Railroad.

11 The impact of the bridge, the bridge  
12 crossing was mainly our main concern, but that  
13 lead to the abandoning of the railroad and that.  
14 We were involved with this railroad line several  
15 times before with CSX and that.

16 So I knew roughly how old it was. I  
17 can't remember if there was one or two tracks,  
18 but there was a track down the middle of that old  
19 railroad embankment back 30, 40 years ago,  
20 whenever it was.

21 Q. Did you know that the CSX twin tracks were  
22 back behind the development?

23 A. Did I know?

24 Q. Yes.

25 A. Yes.

1 Q. And how did you know that?

2 A. The B & O main, the active ones now?

3 Q. Whatever they're called, yeah, the active  
4 ones. How did you know?

5 A. Well, I mean, they have been there forever.  
6 I've lived in Perrysburg for 30-some years. I've  
7 know that.

8 Q. Did you ever see a train go by the back of  
9 the Old Granite development before the clearing  
10 was done?

11 A. No, not -- I really probably never did, no.

12 Q. Did you ever hear one go by?

13 A. No, I'm sure I never heard one either  
14 because the few times I was there in 2005 before  
15 all the clearing -- you are talking about before  
16 the clearing and all that, I'm sure. I never saw  
17 that either.

18 Q. How many times do you think you were there  
19 before the clearing was done?

20 A. A few times.

21 Q. Can you put a number on a few, two, three?

22 MR. ROBON: Objection if you're  
23 guessing.

24 A. I don't want to guess, but a few times; I  
25 don't know.

1 Q. No more than a handful?

2 MR. ROBON: Objection. He answered  
3 the question.

4 A. A half dozen.

5 Q. On those occasions, how long would you  
6 typically be there?

7 A. My grandson was there. I would be there for  
8 typically, I'm there to see them. I'm hanging  
9 around there for a little bit, but I don't ever  
10 recall seeing a train or hearing a train.

11 Q. Would your typical visit be an hour or two  
12 or something?

13 A. Yeah.

14 Q. You didn't really spend the night or  
15 anything?

16 A. No.

17 Q. Why don't we take five?

18 (Off the record.)

19 - - -

20 CROSS EXAMINATION

21 BY MR. TASSE:

22 Q. Mr. McCarthy, my name is Jeff Tasse.

23 I'm an attorney for Ric-Man. I'm going to ask  
24 you some questions following those of Mr. Bahret.

25 A. Yes.



1 Q. So far you are doing well, you're answering  
2 with words, and we will keep doing that, okay?  
3 Fair enough?

4 A. No uh-huhs.

5 MR. ROBON: Let the record indicate  
6 that his opinions will be paid for.

7 MR. TASSE: At the same rate.

8 MR. BAHRET: Yeah, at the going  
9 rate.

10 Q. You're not on any medications or anything  
11 today, are you, sir?

12 A. No, no, I'm not.

13 Q. The reason we ask is we don't want you to go  
14 to court and say, "Well, I was on some sort of  
15 painkiller and couldn't answer clearly." That's  
16 not an issue, is it?

17 A. No.

18 Q. You said you've testified before. How many  
19 times have you testified in a deposition or a  
20 trial?

21 MR. ROBON: Don't guess.

22 Q. Again, let's be clear here. Don't guess.  
23 Answer if you know so that Marv doesn't have to  
24 remind you every time the question comes up, all  
25 right? But you can give us your best estimate or

1 your best recollection.

2 A. Dozens.

3 Q. Have you ever testified as an expert  
4 witness?

5 A. Yes.

6 Q. How many times would you say you've done  
7 that?

8 A. Well, it goes back a lot of years. So, I  
9 don't know, maybe half a dozen, dozen times.

10 Q. Are these in your work with the Corps of  
11 Engineers?

12 A. Yes. Most of this was -- I can't remember  
13 anything back before that.

14 Q. Since you've been self-employed, as you  
15 talked about earlier, have you testified as an  
16 expert witness in any of those matters?

17 A. No.

18 Q. Have you ever been paid outside of your  
19 salary for the Army Corps of Engineers, have you  
20 ever been paid separately to give expert  
21 testimony in a deposition for trial?

22 A. No.

23 Q. No?

24 A. No.

25 Q. And you don't think you've given testimony

1       since you've been self-employed? Is that what  
2       you said?

3       A. Yes.

4       Q. I have to jump around a little bit, so bear  
5       with me. You talked about some work you did  
6       after your schooling in New York, and you said  
7       you were doing some construction superintendent  
8       work; is that right?

9       A. Uh-huh.

10      Q. Yes.

11      A. Yes, sorry.

12      Q. And you said the bottom fell out of the  
13      housing market, right?

14      A. Yes.

15      Q. So that was time for you to get out of that  
16      and do something lucrative, fair enough?

17      A. Yeah, I didn't have a job anymore.

18      Q. All right. You're aware that the housing  
19      market ebbs and flows, aren't you?

20      A. Uh-huh.

21      Q. You have to --

22      A. Yes, yes.

23      Q. We have to make a record. That's why we do  
24      that, okay? I'm not trying to embarrass you.

25      And so it's fair to say that like in the current

1 times you would agree that the housing market has  
2 kind of bottomed out; isn't that right?

3 A. Yes.

4 Q. That started with the terrorist attacks of  
5 9/11 and gone forward since then; isn't that  
6 right?

7 MR. ROBON: Objection.

8 A. No.

9 MR. ROBON: You can answer if you  
10 know.

11 A. I've been a little bit involved with that  
12 even though that's not my expertise. I think  
13 around Perrysburg, when I was working in the  
14 housing business over there, Levis Commons, the  
15 bottom really fell out last year.

16 Q. In what year?

17 A. We are talking about 2006, middle or end of  
18 2006 things got really bad.

19 Q. You're aware there were no sales of any  
20 properties of Old Granite, either real estate or  
21 housing, in the years approximately 2002 or '03  
22 up and through '06, are you not?

23 MR. ROBON: If you know.

24 A. It wasn't involved with the sales stuff.  
25 I'm not familiar with that.

1 Q. So you don't have any knowledge of the sales  
2 history of properties at Old Granite from 2002 to  
3 2006; is that right?

4 A. None.

5 Q. You know that your son was living in that  
6 house on Lot 15, but I think we heard testimony  
7 he wasn't paying any rent, isn't that right, in  
8 '05, '06?

9 A. Don't ever tell him that. I don't know -- I  
10 really don't know that. That's debatable.

11 Q. It's kind of a nebulous prospect?

12 A. I'm not familiar with what the arrangements  
13 were.

14 Q. Do you know if he ever took out a mortgage  
15 for any property out there?

16 A. I don't know.

17 Q. With respect to your work for the county, or  
18 the Corps of Engineers, I'm sorry, did you ever  
19 have any expertise with drainage plans? Did you  
20 ever work with drainage plans and that?

21 A. Yes.

22 Q. Did you ever develop a drainage plan for any  
23 subdivision during your time with the Army Corps?

24 A. No, not for specific subdivisions. The  
25 Corps of Engineers generally was on more bigger

1 scale, the more regional kind of things.

2 Q. Tell me what experience you had with  
3 drainage plans for bigger scales, as you  
4 described it?

5 A. Well, one of our main things with the Corps  
6 of Engineers is flood control. And probably I  
7 spent more time on that than any other single  
8 thing. And, say, Point Place we had to put in  
9 all new --

10 MR. ROBON: Do you know where Point  
11 Place is or where it is?

12 A. It's a section of Toledo.

13 Q. Go ahead.

14 A. And we had to design and build the new  
15 interceptor sewers, storm sewers for Point Place  
16 because we put all new pump stations to take it  
17 all out over the wall when it rained too hard up  
18 there.

19 And we, you know, as far as rainfall  
20 and accumulation of water, that was our main  
21 business. What was a nine-inch rain, which is a  
22 six-inch rain, you know what does it do, the  
23 water calculations.

24 We call it H & H, our hydrology and  
25 hydraulics work. That was the kind of thing,

1 even though I was mainly a construction  
2 administrator, when I worked for the Corps, we  
3 were trained in these things on Buffalo as a  
4 young engineer.

5 And in the course of events while  
6 you're the administrator, we end up changing  
7 everything. Everything, maybe like this thing  
8 here, there's all kinds of questions come up,  
9 changes and whatnot, and I was involved with --

10 Q. Supervision of that?

11 A. Supervision of it, and I had a small office.  
12 A lot times I would be doing some of it myself.

13 Q. Let me ask you this: Its sounds like you  
14 had some training in storm sewers and the like in  
15 your early years with the Corps of Engineers; is  
16 that right?

17 A. Right.

18 Q. So much like the lawyers at this table take  
19 courses in estate or family practice, we had some  
20 training early in our careers, but we really  
21 don't specialize in it. Is that true; you didn't  
22 specialize in drainage and storm sewers?

23 A. No, because --

24 Q. Or did you? Did you or did you not?

25 A. Our work, this is OJT or whatever. Our work

1 did involve those specific things, you know, like  
2 I'm saying.

3 Q. What about you?

4 A. Me?

5 Q. Did you specialize -- is it your testimony  
6 you specialized in drainage and subdivision  
7 drainage plans and the like?

8 A. Let's leave the subdivision off. I mean,  
9 every neighborhood is a subdivision somehow.

10 Q. Did you specialize in that though?

11 A. I did not specialize in it.

12 Q. You were in construction administration?

13 A. Construction administration.

14 Q. You had a supervisory role?

15 A. That was my main role.

16 Q. Thank you. That's what I'm trying to find  
17 out. You mentioned along the way in your  
18 testimony that you had a contractor you hired to  
19 build a mound. Who was that?

20 A. We hired, I think the only one we hired was  
21 the George Gradel Company.

22 Q. Spell that last name.

23 A. G-r-a-d-e-l, Toledo.

24 Q. In Toledo?

25 A. Uh-huh.



1 Q. That's a yes?

2 A. Yes.

3 Q. And when did you hire him?

4 A. That would have been sometime in early 2006.

5 Q. Had you hired them before the clearing was  
6 done?

7 A. No.

8 Q. Did you have any association with the Old  
9 Granite property in the way you are associated  
10 with them now prior to the clearing taking place?

11 A. No.

12 Q. As you told Mr. Bahret, you were out there a  
13 few times to visit your son, grandson or  
14 grandchild, but nothing more extensive than that  
15 prior to any clearing take place?

16 A. Right, and then I want to correct that. My  
17 son just called. I wasn't -- my grandson wasn't  
18 over there until early 2006. So even though I  
19 was there in 2005, it wasn't for hours. It was  
20 probably a couple three times for half hour or  
21 something. We were looking at the house or doing  
22 some other things prior to him actually moving in  
23 there.

24 Q. So you never -- is it fair to say that in  
25 2005 and prior to the clearing, any of the times

1       you were there, you never really paid any  
2       attention to the backyards, to the vegetation or  
3       to the foliage behind the house?

4       A.   I never paid direct attention to that.

5       Q.   Whatsoever, right?

6                   MR. ROBON:   Objection.   You're  
7       putting words.

8                   MR. TASSE:   That's the point of  
9       Cross-Examination.   I'm asking him for his  
10      testimony.

11                   MR. ROBON:   Don't limit yourself.

12                   MR. BAHRET:   Marv, do you think you  
13      really need to be coaching the witness so openly?

14                   MR. ROBON:   He is asking the same  
15      questions you asked.

16      A.   Well, yeah, I agree.   I didn't look at them  
17      specifically, you know, but I was aware.   I was  
18      in the backyard and that kind of thing.

19      Q.   Fair enough, but you never measured, you  
20      never took pictures, anything like that?

21      A.   Did not do anything of that, no.

22      Q.   Isn't it fair to say that you never did any  
23      measurements?   Even after you got involved and  
24      after the clearing, you never took a tape rule  
25      out and did measurements of distances from behind

1 the house to the railroad properties, etc.?

2 A. Yeah, we did that.

3 Q. You did? What did you do?

4 A. We measured all the distances. We made sure  
5 that, you know, that the development and houses  
6 were where they were supposed to be and what the  
7 distance was from the back of the house to the  
8 property line. You know, a lot of times you  
9 build a house, the guy just puts it there. It  
10 might be five or ten feet off. I did measure  
11 that kind of thing.

12 Q. Why did you do that?

13 A. To verify that our plans were right and the  
14 things physically did, you know, sit where they  
15 were supposed to.

16 Q. You measured from property line to the  
17 houses to make sure the houses were the right  
18 places?

19 A. Uh-huh.

20 Q. Yes?

21 A. Yes.

22 Q. You did that after you were hired, after the  
23 clearing, right?

24 A. Right.

25 Q. But you never measured, prior to any

1 clearing, you never measured the depth or the  
2 distance of vegetation behind the house to the  
3 Old Granite property?

4 A. No, no, we never would have done that.

5 Q. So you don't have any measurement of that?

6 A. No.

7 Q. So any testimony you give, like you talked  
8 about a hundred feet earlier of something or  
9 other, that's based on aerial photos that you've  
10 seen, right?

11 A. Aerial photos, and we had -- the City did  
12 some videotaping before the clearing, and Christy  
13 gave me a copy of that tape, and, you know, I  
14 had -- I went through that, and I saw the  
15 pictures that were taken.

16 Q. The distances you gave to Mr. Bahret, those  
17 are just speculation or best guesses, aren't  
18 they? You didn't have any specific measuring  
19 devices to do that, did you?

20 A. No, we didn't. What I was really doing was  
21 I wanted --

22 MR. ROBON: Answer his question.

23 THE WITNESS: It's hard to answer.

24 MR. ROBON: Did you measure anything  
25 or not?

1 THE WITNESS: Yes, we did. We

2 measured right down to the --

3 Q. You told me what you measured, sir; isn't

4 that right? Have you told me what you measured?

5 A. No. I said we measured a lot of the things.

6 We, before we brought Peterman in, I went and I

7 measured from the railroad, the active railroad,

8 which is the baseline for all of Perrysburg, to

9 make sure that what those drawings were that

10 Peterman had made, that they were correct.

11 Q. You were measuring from the railroad to the

12 property?

13 A. To the development.

14 Q. To the development property, right?

15 A. Yes, to make sure that the railroad and all

16 that was just like it showed on the drawings

17 because we were -- the City, we were all arguing

18 about whether you're off a few inches, whether

19 this tree is on this line or that line.

20 So I went, before we brought Peterman

21 in, I did go and check to make sure that he was

22 right on this thing.

23 Q. And basically you said that what you found

24 was the City of Toledo's survey and markings were

25 essentially correct; isn't that right?

1 A. The lath that they put in there finally was  
2 correct.

3 Q. What I'm asking you, though, and what I  
4 think you've told me is you didn't take any  
5 measurement of any width or depth of vegetation  
6 at any time; isn't that right?

7 A. It was gone.

8 Q. The answer is no?

9 A. No.

10 Q. You don't hold yourself out as an expert in  
11 aerial photography?

12 A. No.

13 Q. You don't hold yourself out as an expert in  
14 aerial photography, do you?

15 A. No, I don't.

16 Q. And you don't hold yourself out as an expert  
17 surveyor for hire, do you?

18 A. Can't.

19 Q. Never been paid to do that in your  
20 independent business, right?

21 A. Right.

22 Q. You mentioned at one time you were talking  
23 about the pictures that you're going to provide  
24 for us. Do you remember that testimony?

25 A. Yes.

1 Q. Do you have those on your home computer?

2 A. Yes, some of them. Some of them are on my  
3 son's or his computer, and Marv has some.

4 Q. You understand we are making a formal  
5 request that you produce those and not delete  
6 anything, correct?

7 A. Yes, I gather that, yes.

8 Q. All right. And you said at one point, I  
9 think, "Between the three of us, we've got all  
10 sorts of photographs." And I take it you mean  
11 you, right?

12 A. Right.

13 Q. Your son, and what's his name again?

14 A. Michael.

15 Q. Michael McCarthy?

16 A. Yes.

17 Q. Who's the third person?

18 A. We turned some of them over to --

19 Q. Mr. Robon?

20 A. -- Mr. Robon. And I think he has a couple  
21 photos, too, but whatever.

22 Q. Those are the three you're talking about?

23 A. Yes. This is where they are.

24 Q. I take it from your testimony that you had  
25 no involvement with the preparation of any

1 drainage plan for Old Granite with Peterman when  
2 they did it originally; isn't that right?

3 A. Right.

4 Q. You talked about some sort of flooding issue  
5 during construction, and you said that you worked  
6 on -- "They started pumping down by Bates." Do  
7 you remember that testimony?

8 A. Right.

9 Q. What were you talking about there? Who's  
10 they started pumping?

11 A. Ric-Man, your client.

12 Q. What do you mean when you say they were  
13 pumping down by Bates? What does that mean?

14 A. When they were working down by Bates Road,  
15 they had a lot of the water coming in. And so  
16 they were pumping -- they were pumping in that  
17 manhole, that same manhole. They had a hose  
18 sticking in the manhole. I said, and it's coming  
19 out of the manhole back into Cambridge ditch,  
20 Cambridge drainage system and going out our  
21 system.

22 So I asked -- I told Christy Soncrant,  
23 I said, you know, "Hey," I think this would have  
24 been after they -- this is after they cut the  
25 culvert. And I said, "Well, you know, here's



1 your proof it's coming back the other way."

2 Q. Let me ask you this because I'm not  
3 following you. You say first of all there is  
4 pumping going on by Bates Road, right?

5 A. And they put a --

6 Q. No, no, we can agree that Bates Road is far  
7 beyond and in an easterly direction from where  
8 Cambridge property is, correct?

9 A. Well, 500 feet or so.

10 Q. It's certainly not on your property?

11 A. Right.

12 Q. Now, when you say there is pumping going on  
13 there, I have no idea what you mean by that.  
14 What do you mean pumping at Bates Road?

15 A. Ric-Man was dewatering on or along Bates  
16 Road.

17 Q. Along Bates Road?

18 A. Yes, for the pipe, the water main to go  
19 through there.

20 Q. And you say they had pumps and pipes going  
21 somewhere, or hoses?

22 A. Yeah, they had their trench pump pumping  
23 into, with a hose into this manhole.

24 Q. Into what manhole?

25 A. The manhole that we have been talking about

1 earlier that's 30 feet or so away from the corner  
2 of Cambridge.

3 Q. All right. What was the designation you  
4 gave that? It was three letters?

5 A. VCP.

6 Q. VCP. Okay, can we agree as we go forward --

7 MR. ROBON: V or P?

8 MR. TASSE: V.

9 THE WITNESS: Vitrified.

10 Q. Can we agree that as we go forward here,  
11 when you're talking about the manhole or the VCP  
12 pipe, it's that one that's 30 feet east of Old  
13 Cambridge property, right?

14 A. Yes, Old Granite property.

15 Q. Old Granite, Cambridge, right. And we can  
16 also agree that that VCP manhole is not on any  
17 Cambridge property, correct?

18 A. That's right.

19 Q. All right. So your testimony now about this  
20 pumping at Bates Road is that they were pumping  
21 out for dewatering at Bates?

22 A. Uh-huh.

23 Q. And they were pumping the water somewhere.  
24 Where do you claim they were pumping the water  
25 to?

1 A. Into that manhole or that VCP manhole.

2 Q. All right. And this was after the cutting  
3 of that VCP?

4 A. Right.

5 Q. All right. Then what else did you observe?

6 A. That the water was coming out at Cambridge.

7 Q. Where?

8 A. Right out, right out the pipe that, you  
9 know, led to our catch basins in the back.

10 Q. What pipe? What property are you on?

11 A. Right at the back of Cambridge, right where  
12 this manhole was. We had -- we could see that  
13 this was leaking right through and coming back  
14 into the -- there wasn't any rain or anything.  
15 This water was going right over land right into  
16 our catch basin, you know, the Cambridge catch  
17 basin, and it only started when they started  
18 doing this pumping.

19 Q. You say there was water over land. That  
20 sounds like you mean on top of the ground?

21 A. On the ground.

22 Q. So you saw water on top of the ground from  
23 that pumping?

24 A. Right.

25 Q. Going onto Cambridge?

1 A. Right. Right from that manhole, it went  
2 down in that manhole, came back. These intake  
3 pipes that we were talking about earlier, it was  
4 flowing backwards, coming down through those  
5 intake pipes into our catch basin, our catch  
6 basins that we had put in, and we were picking up  
7 -- we were taking care of their water.

8 Q. Who was with you when you saw this?

9 A. I called out Christy Soncrant, and I know  
10 that Joe Crandall, I believe he came over to see  
11 this incident. So, "Well, that's not really  
12 bothering you." I said, "Yeah, but can't you see  
13 that, you know, if you hadn't cut this thing, you  
14 know, it would have been going out that way."  
15 Well, that wasn't really -- that was plugged off  
16 or something.

17 Q. You haven't told me what manhole on the  
18 Cambridge property you claim to have seen  
19 evidence of water coming from?

20 A. At Lot 15 right at my son's.

21 Q. So on Lot 15 --

22 A. On Lot 15, there is --

23 Q. There is a manhole?

24 A. There is a manhole. We call them a catch  
25 basin, a little --

1 Q. What exactly did you see in the catch basin  
2 on Lot 15 on this one occasion?

3 A. This water.

4 Q. You saw water doing what?

5 A. Going into our catch basin and then out.

6 Q. You saw water flowing --

7 A. Flowing over land and into this catch basin,  
8 and we were -- they were using our system to pump  
9 out Bates Road.

10 Q. How did the water get from a piece of hose  
11 going into the manhole, the VCP manhole and then  
12 go over land? How did that happen?

13 A. Well, we have an outlet pipe there at  
14 Cambridge.

15 Q. Where is that?

16 A. That's a couple hundred feet from -- a  
17 couple hundred feet from Lot 15.

18 Q. Going which way?

19 A. We probably need a little sketch or  
20 something. There is a pipe that picks up water.

21 Q. Tell me where this outlet pipe is that  
22 you're talking about. A couple hundred feet from  
23 Lot 15 going towards the Hospice area?

24 A. Yes, going toward the Hospice.

25 Q. And that outlet pipe is different from your

1 manhole?

2 A. Right.

3 Q. The catch basin?

4 A. That's what feeds -- in normal times, that  
5 would have been picking up this top --

6 MR. ROBON: Answer his question.

7 Is it different?

8 A. Yeah.

9 Q. So your outlet is different from your catch  
10 basin; is that what you're saying?

11 A. The outlet goes to the catch basin.

12 Q. Is the outlet visible from the ground?

13 A. Uh-huh.

14 Q. Yes?

15 A. Yes.

16 Q. Does it look the same?

17 A. No, no. This is a one-foot diameter pipe.  
18 This is down at the bottom of the trench; that's  
19 where it picks up. Now it's flowing backwards  
20 because they're pumping water in from Bates Road.  
21 It's flowing back there and out into the  
22 Cambridge. So the whole system is working  
23 backwards.

24 Q. So, basically, you're the only person on  
25 behalf of Cambridge who knows about this one

1 event, right? Nobody else was there?

2 A. My son might have seen it. I don't know  
3 whether or not.

4 Q. Well, did he or did he not?

5 A. I couldn't say.

6 Q. You're the only one who knows, to your  
7 knowledge; is that right?

8 A. Uh-huh.

9 Q. Yes?

10 A. Yes.

11 Q. It happened on one occasion, right?

12 A. Yeah, they only pumped out once.

13 Q. You didn't do any specific tests in that VCP  
14 manhole ever to determine which way or where --  
15 or if water flowed anywhere, did you? You?

16 A. No.

17 Q. Are you aware of tests that can be done?

18 A. As far as the flow?

19 Q. Yes.

20 A. Yeah, we have tests to say what can flow.

21 Q. What are those? What kind of tests can you  
22 do to verify flow?

23 A. You know, the main one we use is we put  
24 orange peels in and see which way it flows.

25 Q. So you have your orange peel test. What

1 other tests are you aware of?

2 A. We wouldn't -- you wouldn't use anything. I  
3 mean, this thing already been --

4 Q. I'm just asking if there are tests to  
5 determine flow. Orange peel test, what else?  
6 Any others you're aware of?

7 A. No.

8 Q. All right.

9 A. We never used any.

10 Q. Did you do an orange peel test on this  
11 manhole?

12 A. We couldn't. It was, you know --

13 Q. I'm just asking if you did.

14 A. No.

15 Q. And you talked at length with Mr. Bahret  
16 about what pipes you saw in the VCP manhole. Do  
17 you remember that?

18 A. Uh-huh.

19 Q. Yes?

20 A. Yes.

21 Q. How do you know? Are you talking about from  
22 standing above ground looking down into it? Is  
23 that how you know?

24 A. It went right down in there.

25 Q. It did?



1 A. Uh-huh.

2 Q. Okay, tell me -- and pardon me for jumping  
3 around here. I want to find out when you claim  
4 the pumping exercise from Bates Road took place  
5 that you just talked about a minute ago. When  
6 did that happen?

7 A. That would have been in the summer of 2006.

8 Q. Was that after the water main pipe had been  
9 laid behind Cambridge?

10 A. Yes.

11 Q. Can you give me -- can you be any more  
12 specific besides summer of '06?

13 A. August, give or take a month.

14 Q. That happened one time, right?

15 A. Yes, they only did that once.

16 Q. Now, you say you climbed down into the VCP  
17 manhole; is that right?

18 A. Yes.

19 Q. You personally?

20 A. Yes.

21 Q. Was anybody present?

22 A. I think my son was there when I climbed down  
23 in it, and --

24 Q. You think he was or you don't know?

25 A. I don't know.

1 Q. All right. Was anybody else there, any of  
2 your people from Peterman or anyone like that?

3 A. No.

4 Q. So you basically did that alone?

5 A. Uh-huh.

6 Q. Yes?

7 A. Yes.

8 Q. Did you take any pictures or videotape down  
9 there?

10 A. Yes.

11 Q. Which of those?

12 A. Pictures.

13 Q. How far down did you go? All the way to the  
14 bottom?

15 A. Yes.

16 Q. What did you do when you got down there?

17 A. Well, I had to dig a little bit to make sure  
18 that we had the pipes.

19 Q. You had to what?

20 A. Had to dig a little bit.

21 Q. Dig what?

22 A. There was mud in the bottom of it.

23 Q. So you had to dig dirt and mud out of the  
24 pipes; is that right?

25 A. No, out of the manhole, you know, the

1 manhole, pipes comes in, three pipes come in, and  
2 clean it up to make sure that we could see  
3 everything.

4 Q. How much dirt and mud did you have to dig  
5 out?

6 A. Not much. It was mostly just pushing to the  
7 side, and you get oriented down there so you  
8 could see where the -- I mean, you have to do  
9 this upside down. This isn't a kind of thing  
10 that you would normally do.

11 Q. So you leaned over the top and looked in; is  
12 that what you're saying?

13 A. No, I climbed right down in there.

14 Q. Then why are you upside down? I'm not  
15 following you.

16 A. It's deep.

17 Q. What made you go upside down?

18 A. So you could get down in and see what was,  
19 you know, what was there and be able to reach  
20 around the bottom and get pictures and that kind  
21 of thing.

22 Q. I'm trying to figure out how you got upside  
23 down if you climbed down in there. What do you  
24 mean? Did you climb down like head first?

25 A. Yes.

1 Q. You're hanging upside down and taking  
2 pictures; is that right?

3 A. I think I did have my son there because he  
4 had to make sure I didn't crash down in there.

5 Q. What, was he holding your ankles?

6 A. Yeah, or my legs. But, any rate, I went  
7 down in there, and I think I had -- I had some  
8 kind of tool so I could reach down the rest of  
9 the way, and we took pictures.

10 Q. What was the tool for?

11 A. Move some of the dirt, make sure you got the  
12 pipes --

13 Q. With a shovel or something?

14 A. Yeah, I forget what I had. But I had some  
15 kind of a little lawn tool or rake or some little  
16 thing.

17 Q. So you're moving the dirt around so you  
18 could see?

19 A. Yeah, make sure you could see which pipes  
20 were which.

21 Q. All right. Because without that, you had a  
22 hard time determining, right?

23 A. Right. But at any rate, I saw them, I took  
24 pictures, and I took -- and I -- well, I didn't  
25 go upside down with Marv. We went down and took

1 other pictures from the top, and you could see  
2 the pipes.

3 Q. When did you do your upside down thing in  
4 the pipe? When did you do that?

5 A. That would have been, you know, summer of  
6 2006.

7 Q. After the clearing?

8 A. After the clearing? Yes, yeah, it would  
9 have had to be.

10 Q. Can you be more specific other than summer  
11 of '06?

12 A. Well, I really don't know because, you know,  
13 I was in that -- you see --

14 MR. ROBON: Answer the question.

15 A. It had to have been early summer because the  
16 top was knocked off. That is how I was able to  
17 get way down in there. The top three or four  
18 feet were knocked off already, and that's why you  
19 could get, easily get down in there and see.

20 Q. The pipe was broken off?

21 A. Yeah, they knocked off the top of the  
22 manhole.

23 Q. So the cover was off?

24 A. The cover and --

25 Q. Three or four feet?

1 A. And the top piece of the clay pipe.

2 Q. Three or four feet, is that what you said?

3 A. Yeah, Ric-Man had knocked that over and  
4 knocked dirt down in there, and that's why I had  
5 to have -- that's why I was doing some digging to  
6 get some of the dirt out of the way so I could  
7 see the pipe.

8 Q. How do you know Ric-Man knocked it over, as  
9 you claim?

10 A. That was only because they just done and  
11 probably -- I don't know whether the clearing  
12 guy -- we say Ric-Man as a collective thing.

13 Q. Try to be specific as to who you're talking  
14 about. Is that because you really don't know?  
15 You say Ric-Man. Could it have been anybody out  
16 there?

17 A. No, Ric-Man was the only one that had  
18 bulldozers that I understand. And this was after  
19 they had graded down there. It's my  
20 understanding that was Ric-Man's bulldozer.

21 Q. Now, you never went in that or examined that  
22 VCP manhole prior to the clearing; isn't that  
23 right?

24 MR. ROBON: Asked and answered.

25 Q. Is that right?

1 A. I think, yeah, we've already answered that.

2 Q. All right. So you don't know the condition  
3 of it before the clearing was done; is that fair?

4 A. Right.

5 Q. And you didn't see anybody physically, you  
6 didn't personally observe anybody break that  
7 manhole pipe, did you?

8 A. Wait a minute.

9 Q. Did you personally observe it or not?

10 A. I did not.

11 Q. So in fairness to you, you really can't  
12 testify of your own personal knowledge how that  
13 manhole pipe came to be in the condition it was  
14 in when you saw it; isn't that right?

15 A. No, that's not quite true. Remember, we  
16 already --

17 Q. Tell me how you can do it if you didn't  
18 observe it, if you never observed it before then?

19 A. I did. Remember we talked about earlier, I  
20 was out there when they first did the clearing,  
21 before the bulldozer came by. And I had seen the  
22 thing was disturbed. No telling who did it. Then  
23 we came back again.

24 Q. When is that now?

25 A. That would have been in April, give or take

1 a month, whenever the clearing was done.

2 Q. So in April or after the clearing was done?

3 A. After the clearing was done we saw this  
4 thing had been -- this thing was knocked off. No  
5 telling who did it. There was some -- whether  
6 the clearing guys did it or not, I don't know.  
7 But the only one to my knowledge that came by  
8 through there with a bulldozer was Ric-Man, and  
9 if you didn't --

10 Q. Let me just ask you this and we can move on.  
11 If you didn't see this manhole, this VCP manhole  
12 area before then, how do you know anybody knocked  
13 it off to be in that condition when you first saw  
14 it?

15 A. I never said they did.

16 Q. You don't know?

17 A. I do not know.

18 Q. That's all I'm asking you. Let's see, did  
19 you tell us the name of the neighbor from the  
20 Gillette property? Did you give us that name?

21 A. The name of the property owner is Gillette,  
22 and I was going to --

23 Q. You're going to get us the name of the guy?

24 A. Yeah, I can get you the name of the man that  
25 actually I talked to.



1 Q. Can you describe him for us at all, elderly,  
2 white male, anything?

3 A. He is probably 50 years old or something,  
4 and he is Mrs. Gillette's son-in-law or  
5 grandson-in-law. But he is married to one of the  
6 Gillette daughters, takes care of the place.

7 Q. Have you talked to him more than one time?

8 A. Uh-huh, yes.

9 Q. How many times would you say you have talked  
10 to that person?

11 A. Twice.

12 Q. When was the last time?

13 A. The last time was probably a few months ago.

14 Q. Is that in late 2007?

15 A. Yes.

16 Q. Like December, November?

17 A. I stopped there, asked him to confirm some  
18 of this stuff he had said.

19 Q. Did you ask him if he would be a witness for  
20 you when this case went to trial?

21 A. I did not.

22 Q. Do you anticipate doing that?

23 MR. ROBON: Objection. He is not  
24 the lawyer.

25 Q. You can answer.

1 A. I don't know.

2 Q. Let me ask you a little bit about the  
3 flooding you talked about in 2006. Do you  
4 remember that?

5 A. Uh-huh -- yes.

6 Q. Now, as I understand it, the only place  
7 there was flooding and we have pictures of is in  
8 that back corner, say Lot 15 and then off of the  
9 Cambridge property over toward the VCP manhole;  
10 is that right? That's what we are talking about?

11 A. Lot 15, 16, a little bit on 14.

12 Q. Back in the corner there, is that right?

13 A. Yes, back in the corner.

14 Q. All right. Now, on that occasion, there was  
15 no personal injury that arose out of that  
16 flooding; isn't that right?

17 A. Right.

18 Q. There was no property damage that arose out  
19 of that flooding; isn't that right?

20 MR. ROBON: If you know.

21 A. I don't know.

22 Q. Are you aware of any claim for property  
23 damage ever being made from that flooding?

24 A. That wasn't my --

25 Q. You're not aware of any, are you?

1 A. I'm not aware of any.

2 Q. Your son didn't say his basement flooded,  
3 did he?

4 A. No.

5 Q. You've never heard that, have you?

6 A. No.

7 Q. You're not aware of any basements in the  
8 subdivision, any of those properties, ever having  
9 any flooding, are you?

10 A. No.

11 Q. That was a one time event; am I correct?

12 A. No.

13 Q. To your knowledge.

14 A. No, I think this has been a steady  
15 situation. Whenever it rains, you know, after  
16 they have cut the manhole, they cut the pipe that  
17 went to the manhole, the main culvert, every time  
18 it rains, it takes a little longer to drain it.

19 Q. How do you know that?

20 A. Well, the main evidence would be that it  
21 flows backwards from the manholes.

22 Q. Mr. McCarthy, are you off into speculation  
23 here as to every time it rains, you've got  
24 flooding in that back corner? Is that what  
25 you're trying to say?

1 A. I've been over there several times when it  
2 rained.

3 Q. Have you kept records of it?

4 A. I think we got records, if you call  
5 pictures.

6 Q. Tell me what records you have of flooding  
7 other than the one-time occasion of April of  
8 2006?

9 A. We have other pictures.

10 Q. What pictures?

11 A. Several times of pictures.

12 Q. You've got pictures. Do you have any  
13 written records?

14 MR. ROBON: Let me clarify the  
15 record.

16 MR. TASSE: Jack -- or it's Marv.  
17 Marv.

18 MR. ROBON: Let me object and  
19 clarify something. You said April.

20 MR. TASSE: Wait, wait, wait.

21 MR. ROBON: Wait a minute. You're  
22 putting words in his mouth.

23 MR. TASSE: No, I'm not.

24 MR. ROBON: You're speaking so fast  
25 you said April of '06. There's no claim that

1           there was flooding in April of '06. I think you  
2           meant to say December, '06.

3                       MR. TASSE: No, I wanted --

4                       MR. ROBON: I want to get the record  
5           straight.

6                       MR. TASSE: Marv, I'd asked you on  
7           the record not to testify. All right, I  
8           understand.

9                       MR. ROBON: He is confusing the hell  
10          out of you.

11                      MR. TASSE: Are you finished?

12                      MR. ROBON: I'm finished.

13                      MR. BAHRET: In fairness to Maureen,  
14          let's have one person speaking at a time, okay?

15                      MR. TASSE: I'd ask you not to  
16          testify for the witness. I'd ask you not to  
17          coach the witness, please.

18                      MR. ROBON: I'm not, I'm not.

19                      MR. TASSE: I'd ask you to state an  
20          objection as to form or any other legal basis,  
21          but don't testify and don't give verbatim answers  
22          to the witness.

23                      MR. ROBON: Well, Jeff, when I make  
24          an objection, you overrule me and start talking  
25          and don't stop.

1 MR. TASSE: Just trying to save the  
2 Judge some trouble.

3 MR. ROBON: Am I correct that you  
4 say April of '06 and you intended to say December  
5 of '06?

6 MR. TASSE: You understand my  
7 problem with what you're doing, okay? Just state  
8 your objection and let the witness testify.

9 Q. All right. When do you claim there was  
10 flooding out at Old Granite based on anything to  
11 do with the VCP manhole?

12 A. There has been -- now, we don't use the word  
13 flooding.

14 Q. Okay, what is it?

15 A. Unless it's serious. It's ponding, extra  
16 ponding in the backyard. Flooding to engineers,  
17 you know, like us guys would be more like major  
18 flooding.

19 Q. This is not major; this is some ponding,  
20 right?

21 A. This is ponding of the backyard. There was  
22 several, you know, I would say at least three  
23 times I was over there in 2006.

24 Q. Tell me when those three times were.

25 A. Huh.

1 Q. You don't know?

2 A. I was there before the pipe was cut, and I  
3 was there after the pipe was cut, and it seemed  
4 to me by my eyes and pictures that there was an  
5 impact from that. It was obvious right on the  
6 ground the way the water was flowing that there  
7 was more water in that backyard coming in than  
8 without that pipe.

9 Q. Is it your testimony that prior to the VCP  
10 pipe issue we are talking about being cut that  
11 there was never any ponding in the back corner of  
12 the properties, the back corner of Cambridge  
13 there next to Gillette? Is that your testimony?

14 A. I didn't say that.

15 Q. Because you really have no way of testifying  
16 to that, do you?

17 A. I saw --

18 Q. Do you, because you weren't there, right?

19 A. I saw the condition before --

20 Q. Can you answer my question? Prior to the  
21 pipe being cut, you never inspected that area  
22 back around the VCP manhole after a rainfall in  
23 the Cambridge Subdivision?

24 A. Yes, we did. Oh, yes, we did.

25 Q. You did?

1 A. I did, too, yeah.

2 Q. When? I'm trying to find out --

3 A. In the summertime, that's what I was saying.  
4 I looked at that at least three times before they  
5 cut the pipe and after they cut the pipe. You  
6 know, true enough, I didn't know from 2005 what  
7 little ponding was out there and that.

8 Q. So it could have --

9 A. But this is overland water that's coming  
10 from --

11 Q. It could have ponding that you're not aware  
12 of in 2005 because you never looked at it; is  
13 that right?

14 A. I never looked at it in 2005.

15 Q. All right. In 2006 you think you were out  
16 there a few times and never saw any ponding. Is  
17 that what you're telling us?

18 A. All I'm saying is that the ponding was worse  
19 after they cut that pipe, and I saw evidence of  
20 it.

21 Q. So there was ponding before that you saw,  
22 right?

23 A. There was ponding before and there was  
24 ponding afterwards.

25 Q. All right. But in your visual eye, you



1 think it was worse after the cutting; is that  
2 right?

3 A. And the flow, the visual flow, you could see  
4 where it was coming from.

5 Q. But you don't have any scientific evidence  
6 or proof of the amount of ponding before being  
7 less than the amount of ponding after, do you?

8 A. No, you couldn't --

9 Q. You told me you didn't do any measurements,  
10 right?

11 A. Just the pictures.

12 Q. And the pictures you have, are they dated?  
13 Are they printed?

14 A. Yeah.

15 Q. Are they described as to times and places  
16 and events?

17 A. Yes, all of our pictures -- I think all of  
18 the digitals now time them.

19 Q. They're still on your computer, right?

20 A. I hope so.

21 Q. But you had never printed them out and  
22 written on them, have you?

23 A. No, I haven't done anything like that with  
24 those pictures.

25 Q. I think you testified earlier that you

1 personally observed in the VCP manhole, you  
2 observed an open pipe in there that went in the  
3 direction of the railroad, right?

4 A. Right.

5 Q. After you dug out the dirt and stuff, right?

6 A. Right.

7 Q. And then you observed an outlet over on the  
8 railroad property, is that correct?

9 A. There was three pipes coming into that  
10 manhole down below.

11 Q. I'm just asking you this question for now.  
12 Did you observe an outlet pipe that ran  
13 underneath the railroad right-of-way?

14 A. Yes.

15 Q. And you observed an outlet pipe?

16 A. The end of it.

17 Q. You could see the end of it?

18 A. Right.

19 Q. Who was with you when you saw the end of it?

20 A. No one.

21 Q. What record did you make, contemporaneous  
22 record, meaning at the same time you saw it, of a  
23 visualization of the outlet pipe from the VCP  
24 manhole on the railroad property? What record  
25 did you make of that?

1 A. Just pictures, and I don't think the  
2 pictures can really show -- I'm not sure whether  
3 the pictures really show the end of the pipe.  
4 Mainly a visual thing of me.

5 Q. In your memory, huh? Is that right?

6 A. Oh, yes.

7 Q. So you got pictures of it, you think, right?

8 A. Uh-huh.

9 Q. You have to say yes.

10 A. Yes.

11 Q. But your pictures may not even show it is  
12 what you're telling us, right?

13 A. Right, because the pictures are -- it's  
14 tough to take a picture down in the manhole to  
15 actually show the end of the pipe.

16 Q. But you said you saw the end of the pipe?

17 A. Right.

18 Q. You visualized this on the railroad  
19 property, correct?

20 A. Uh-huh, yes.

21 Q. So when you took the pictures, the purpose  
22 of taking that picture was to memorialize or make  
23 a record of the end of that pipe, correct?

24 A. Correct.

25 Q. I mean, that was your goal, right?

1 A. Right.

2 Q. All right. So I take it if you could see  
3 it, it ought to show up on your pictures; is that  
4 right?

5 A. I'm not so sure about that. Down in the  
6 manhole whether you could actually -- I'd have to  
7 look at the picture really to tell you whether --

8 Q. Well, did you take a picture of the exit on  
9 the railroad property from in the manhole, or did  
10 you take it from outside on the railroad  
11 property?

12 A. We are not even talking about -- we are not  
13 visualizing this thing right. All there is is a  
14 manhole. The only way you can get at it is go  
15 down in it up on the railroad property, and that  
16 is where we took the pictures there.

17 Q. What I'm trying to say --

18 A. I'm not sure how much of those pipes you can  
19 really see from the picture.

20 Q. Do you claim that inside that manhole there  
21 was a pipe that ran underneath the railroad  
22 property and then had an exit?

23 A. Exited out into the center ditch.

24 Q. What I'm asking you is did you observe an  
25 exit out into the center ditch of that pipe that

1 was cut? Did you observe it?

2 A. Yes, I said that earlier.

3 Q. That's what we just talked about and you  
4 took pictures of, right?

5 A. Right.

6 Q. You're going to produce pictures of whatever  
7 of that exit; isn't that right?

8 A. I hope to.

9 Q. It may or may not show it; is that right?

10 A. No, if we have pictures, that will show it.

11 Q. If you don't have pictures, nobody else has  
12 seen that beside you?

13 A. No, I don't think the City ever denies.

14 Ric-Man took it out.

15 Q. Sir, Christy Soncrant testified that she  
16 looked for and never found an exit to that pipe?

17 A. No, but she understands there was a pipe in  
18 there.

19 Q. But she never found an exit to that pipe  
20 onto CSX Railroad. Does that refresh your memory  
21 as to whether you saw anything or not?

22 A. No, I saw it.

23 Q. You saw it, okay.

24 A. It was down in the weeds, and we had to go  
25 to some trouble to locate it.

1 Q. You're going to produce the pictures of it?

2 A. I hope to.

3 Q. You talked about a railroad wall of some  
4 sort back in the area of that manhole cover. Can  
5 you describe what that's about?

6 A. The railroad had a short, what we call a  
7 railroad tie wall, and it was meant to be put  
8 right on the property line from the base of it,  
9 but that was leaning out into the Cambridge  
10 property.

11 Q. Where was it?

12 A. That ran on the back of Lot 15 and part of  
13 Lot 14 and a little bit of Lot 16.

14 Q. How long was this wall?

15 A. I would say it's a hundred, maybe 200 feet  
16 long, a 150, 200 feet long is what I said it was.

17 Q. Was that removed?

18 A. No, that wall was not -- that wall was not  
19 removed.

20 Q. Where is it now?

21 A. It's still there.

22 Q. Is it something you can see?

23 A. No, you can't see the -- no, you can't see  
24 it -- yeah, you can still see it. You can still  
25 see it in parts.

1 Q. How high is that wall?

2 A. It was about four, five feet tall.

3 Q. What's it made out of?

4 A. Railroad ties.

5 Q. Did you claim to know the purpose of that  
6 wall?

7 A. It appeared to us that it was because they  
8 didn't have enough property there to -- however  
9 the alignment worked. They had to build a wall  
10 so they could have their grades. It was just a  
11 typical kind of wall, I mean, when you squeeze  
12 the railroad through a narrower space and you  
13 don't want to get on somebody's property or by  
14 it, you build a little wall so you can start your  
15 grades higher and need less property, and that  
16 was --

17 Q. That's what you think it was for?

18 A. Yeah, and I talked to the railroad about it,  
19 too, and they confirmed that.

20 Q. I'm sorry, you talked to who?

21 A. The railroad, the CSX guy.

22 Q. Who confirmed that?

23 A. Gene Wheeler from the railroad.

24 Q. Is that a man?

25 A. Uh-huh, yes.

1 Q. What was his job or title?

2 A. He is a road master for that section.

3 Q. When did you talk to him?

4 A. That would have been right after the  
5 clearing.

6 Q. Did you talk to him on more than one  
7 occasion?

8 A. In person only once, I think.

9 Q. Did you talk to him at the property site?

10 A. Yes.

11 Q. He came out there?

12 A. Yes.

13 Q. And was he alone when he came out?

14 A. Yes.

15 Q. Was there any document or record made of  
16 that meeting, to your knowledge?

17 A. I don't think so.

18 Q. Sir, I want to run through some pictures with  
19 you, ask you to help identify them, see if you  
20 can. Hand you marked as Exhibit E?

21 (Defendant's Exhibit E marked  
22 for identification.)

23 MR. BAHRET: Can you identify what  
24 Exhibit E is.

25 A. I can't tell you which corner it is, but



1 it's a corner marker for our subdivision.

2 Q. Right.

3 A. I can gather from the pipe.

4 Q. That piece of wood sticking up, is that the  
5 lath you talked about earlier?

6 A. I don't know if this is the lath. This is  
7 probably -- I couldn't tell you whether that's a  
8 Peterman lath or a City of Toledo lath, but  
9 that's our -- you know, with the lay of the land  
10 here, I can't tell which corner it is. But it's  
11 one of the corners of the Cambridge.

12 Q. It's the type of lath you saw on the  
13 property when you first came back there after the  
14 clearing; isn't that right?

15 A. I didn't say I saw any lath then; I saw some  
16 spray paint.

17 Q. Did you see any lath?

18 A. I don't remember seeing any lath.

19 Q. But you don't recall one way or the other?

20 A. I don't recall.

21 Q. Could it have been there; you just don't  
22 know?

23 A. That's --

24 Q. Is that fair?

25 A. That's possible, but that one is probably,

1       that's our -- I couldn't tell you whether that's  
2       City or whether we did it or they did it.

3       Q.   You can see on the ground right below it  
4       there is another weathered lath that's laying on  
5       the ground.  It appears to be coming from the  
6       same point; isn't that correct?

7       A.   Yes.

8       Q.   Isn't that what that is on the ground?

9       A.   Uh-huh.  That's probably an original Peterman  
10      lath.

11      Q.   Do you know that?

12      A.   No, I don't.

13                      MR. ROBON:  Don't guess.

14      Q.   When you say that's probably an original  
15      Peterman, you're talking about the one that's  
16      laying on the ground that's weathered?

17      A.   Yes, it looks pretty old.

18      Q.   The one that's sticking up is obviously new,  
19      correct?

20      A.   Yes.

21                      (Defendant's Exhibit F marked  
22                      for identification.)

23      Q.   Let me show you what's been marked as  
24      Exhibit F.  Do you have Exhibit F in front of  
25      you?

1 A. I do.

2 Q. Why don't you help me identify some of the  
3 things on here. First of all, the gentleman  
4 that's bending with his back toward the  
5 photograph, that's you, isn't it?

6 A. That's me.

7 Q. Who's the other man behind you in like a  
8 golf shirt of some sort?

9 A. Don't know.

10 Q. That piece of equipment, what do you call  
11 that piece of equipment?

12 A. That's a tiny backhoe.

13 Q. Is that a backhoe of Gradel Company?

14 A. This one? I don't think that was a Gradel  
15 backhoe.

16 Q. Whose was it?

17 A. I think I rented it, but I may have had  
18 their man on it. It doesn't matter.

19 Q. I was going to ask you if you ever operated  
20 that backhoe that's shown in this picture?

21 A. Yes, I moved it around a little bit for  
22 them.

23 Q. You know how to operate a backhoe, don't  
24 you?

25 A. Sort of.

1 Q. You know how to dig with a backhoe?

2 MR. ROBON: Objection.

3 Q. I'm asking if he does.

4 MR. ROBON: He answered it.

5 MR. TASSE: Well, I didn't ask him  
6 if he knew how to dig with it.

7 Q. Is that something you can do?

8 A. Sort of.

9 Q. Did you do any digging on the Old Granite  
10 property at any time during this project of '06?

11 A. Yes, with that little backhoe, we went and  
12 cleared some of this dirt off so we could see the  
13 trees, but that's on -- this is on -- we were on  
14 the Cambridge property.

15 Q. This hole that's in the ground in Exhibit F,  
16 that's on Cambridge property, right?

17 A. Yes.

18 Q. AND that was made by the backhoe that's  
19 shown in this picture, correct?

20 A. That's right.

21 Q. That was made by you or one of the guys you  
22 hired to dig it, isn't that right?

23 A. That's right.

24 Q. What was the purpose of you digging that  
25 hole that's shown in Exhibit F?

1 A. We were trying to go and confirm that, yes,  
2 there were trees, tree stumps and that down there  
3 because we started building a mound out here on  
4 the Cambridge property. At one point we thought  
5 we would build this mound because we couldn't  
6 bear the site of this -- the railroad because of  
7 sales and everything.

8 But anyway, we came back here just to  
9 verify that, yes, these bigger trees and that  
10 were on the Cambridge property, and we dug it out  
11 and resurveyed it and showed, so we could  
12 document the ten-inch trees or eight-inch trees,  
13 or whatever.

14 I think you probably got some of the  
15 pictures here, just where they were, that they  
16 were, indeed, on Cambridge property. That's what  
17 we were doing.

18 Q. First of all, let's clarify some things  
19 here. You see the pipe, this very large water  
20 pipe that's in this photograph?

21 A. Yes.

22 Q. Clearly, that's on the railroad property  
23 right-of-way, correct?

24 A. Yes.

25 Q. There is some sort of snow fence that's up

1           there? Do you see that?

2           A. Yes.

3           Q. It looks like you're moving that or removing  
4           that or doing something to that fence in this  
5           picture, correct?

6           A. Well, I don't know what we are doing with  
7           it.

8           Q. Looks like you're reaching down and got your  
9           right arm on it or right hand, correct?

10          A. Yeah. We might have been repositioning  
11          that. They may have had it over on our side or  
12          something, but we made sure we kept that up  
13          because we asked them to put that little fence up  
14          there.

15          Q. Do you know from looking at this picture  
16          what lot this is on?

17          A. It's got to be Lot 15.

18          Q. Now, in the direction that you would be  
19          looking in this picture, you see there is a tree  
20          growing up behind where the backhoe is?

21          A. Yes.

22          Q. Obviously, that tree is in bloom, and it's a  
23          living tree at this time, isn't it?

24          A. Yep.

25          Q. Tell me when you started building your

1 mound?

2 A. It was shortly after they did the clearing.

3 Q. So the clearing took place -- you're not  
4 exactly sure of the month it took place in,  
5 right?

6 MR. ROBON: Asked and answered  
7 three times.

8 Q. I mean, I'm just -- I'm trying to remember  
9 what you said.

10 A. I'm not -- we would have to get our things  
11 out here again, but I think it's --

12 Q. As you sit here today, you don't know?

13 A. March, give or take a month.

14 Q. So after the clearing --

15 MR. ROBON: Just don't guess. I  
16 know you're getting tired.

17 THE WITNESS: I'm not tired.

18 MR. ROBON: Think about what the  
19 hell you're saying. That's not what you said a  
20 little bit ago.

21 MR. TASSE: Is that an objection?

22 MR. BAHRET: Yes, it actually what  
23 he said a little bit ago. He said it was either  
24 February or April, and now he says March, give or  
25 take a month, which is about the same.

1 MR. TASSE: All right.

2 MR. ROBON: You're right, Bob. I  
3 apologize. Bob is always right.

4 MR. BAHRET: Thank you.

5 MR. ROBON: Ninety-nine percent of  
6 the time you are.

7 Q. After the clearing, is that when you hired  
8 the Gradel Company, George Gradel Company?

9 A. We hired them, yes, we did. When we hired  
10 them to save the sale or whatever, we were going  
11 to build this mound.

12 Q. All right. So what did you do to start  
13 building the mound?

14 A. We went and found some dirt and trucked it  
15 in and brought it in on the property and started  
16 pushing it up.

17 Q. Where did you start pushing the dirt up on  
18 what property?

19 A. At the end of -- right on 16.

20 Q. You say you trucked it in from where?

21 A. From Bates Road.

22 Q. Where did you get it on Bates? What was  
23 going on up there?

24 A. Nothing. We just came down the railroad,  
25 the old railroad bed.



1 Q. I'm sorry, where did you get the dirt?

2 A. We got I think all of it, we got it from  
3 Five Point Road in Perrysburg. It was a sewer  
4 job up there.

5 Q. Did you buy it or did you have permission to  
6 take it or how did you get it?

7 A. No, I made arrangements with the sewer  
8 contractor to bring the soil down here.

9 Q. Do you know what kind of dirt that was? Was  
10 it clean fill, was it --

11 A. Yeah, it was virgin fill. I mean, it was a  
12 new sewer line that they were putting down.

13 Q. Who was the sewer job from?

14 A. Who was it from? Who was the contractor?

15 Q. Yeah, who did you get the dirt from?

16 A. I would have to look it up. They were from  
17 out of town.

18 Q. So you have that record somewhere?

19 A. Yes.

20 Q. You brought what kind of a truck, like a  
21 semi tractor full of dirt or pickup truck? What  
22 did you use?

23 A. We had a dozen dump trucks, tandem dump  
24 trucks come in.

25 Q. Came in on the railroad right-of-way?

1 A. Came down from Bates Road. Came up and back  
2 onto Cambridge property that way.

3 Q. Where did they dump the dirt, all on 15 or  
4 16?

5 A. 15 and 16 is where we started.

6 Q. What did you do with the dirt after it was  
7 dumped?

8 A. We started, as the trucks dumped, he would  
9 be pushing it out and grading it up and starting  
10 a mound.

11 Q. He being Gradel Company?

12 A. Yeah, I had a separate guy bring the dirt  
13 in. George Gradel Company, they went and they  
14 provided the equipment.

15 Q. Who was your man from Gradel Company?

16 A. The superintendent?

17 Q. Yes.

18 A. His name was Tom Briggs.

19 Q. Was he the guy doing the grading on the  
20 Cambridge property?

21 A. He was the superintendent. The guys worked  
22 for him, the equipment operators.

23 Q. So he had operators that were there doing  
24 the grading?

25 A. Right.

1 Q. What kind of vehicle or what kind of truck  
2 did they use to do the grading?

3 A. They had a bulldozer and they had a backhoe.

4 Q. In addition to what we see in Exhibit F?

5 A. Yes, this was just to uncover the trees  
6 here.

7 Q. So they brought how many trucks, a dozen  
8 dump trucks full of dirt and put it down, and  
9 then it was graded on to your property; is that  
10 right?

11 A. They used a dozen different trucks, but they  
12 ran it for a day. They probably had ten loads  
13 apiece, probably a hundred, maybe a hundred loads  
14 of dirt we brought in.

15 Q. Did you start to make your mound?

16 A. Yeah, yeah. They went and started shaping  
17 it up. They had the dozer there.

18 Q. First of all, they probably had to do some  
19 filling of low levels on your property, didn't  
20 they, with the first loads of dirt?

21 A. Well, it was already -- you know, this was  
22 already graded. It was already a finished  
23 development. We were raising up the grade of the  
24 backyard.

25 Q. Am I correct in understanding where they

1 dumped the dirt would have been the property edge  
2 of Old Granite right next to where the railroad  
3 property was? They started there and then worked  
4 toward the home?

5 A. Yes.

6 Q. How far did they grade from that point  
7 toward the home? What distance was that?

8 A. Oh, it was probably about 20 feet, 25 feet.

9 Q. How deep, how high did this mound get at any  
10 particular time?

11 A. You can see here; this is all we got. We  
12 got up to about this grade, which is only about  
13 six feet high or five feet you can see here.

14 Q. Is the dirt that we see on the left-hand  
15 portion of this picture, is that part of the  
16 mound?

17 A. This is our dirt over here.

18 Q. So what, if that's your dirt and that's the  
19 mound partially shown in Exhibit F, what is the  
20 hole for that's dug by this backhoe in picture  
21 Exhibit F?

22 A. This hole here?

23 Q. Yes.

24 A. That's where we were verifying where the  
25 trees were so that we could go and survey them

1 and put a line on these and show which trees were  
2 actually, the base of them were on Cambridge  
3 property. We were uncovering the top.

4 Q. Did you have a record of the date when you  
5 brought in the hundred loads of dirt?

6 A. Yes, we do. I've got records of that.

7 Q. What are those records called, I mean?

8 A. They billed us and everything, so that's the  
9 foreman's report or the daily -- some kind of a  
10 daily report.

11 Q. Do you have records from Gradel Company?

12 A. Same thing.

13 Q. Obviously, that work was done prior to any  
14 of the piping laid for the water main project,  
15 wasn't it?

16 A. Yes.

17 Q. Let me show you a few more pictures.

18 (Defendant's Exhibit G marked  
19 for identification.)

20 Q. Do you have Exhibit G in front of you?

21 A. Yes.

22 Q. I take it that's you in the picture shown  
23 next to the pipe?

24 A. It looks like me.

25 Q. And do you know who that other gentleman is

1 standing behind the backhoe?

2 A. I can't tell.

3 Q. All right. And is this another view of the  
4 same hole that you had dug in the ground shown in  
5 Exhibit F?

6 A. It appears to be, yes.

7 Q. The purpose of digging that hole to that  
8 depth was exactly for what?

9 A. We were trying to go and locate the trees,  
10 and we took it right down to the base of this  
11 wall. If you get it real close, you can even see  
12 some of the timbers. We took it right down in  
13 some place to make sure we were showing the wall  
14 because the wall shows up from before we ran this  
15 dirt out of here. We dug it down to the wall  
16 right along our property line.

17 Q. Was this digging that took place in this  
18 picture, Exhibit G, was this before or after the  
19 VCP pipe had been cut?

20 A. No, this was way before.

21 Q. So you had in mind to build yourself the  
22 mound before the VCP pipe issue ever came up,  
23 isn't that right?

24 A. Yes.

25 Q. Did you ever have approval to build a mound

1 at that point from any governmental agency?

2 A. Yes.

3 Q. Who gave you approval to build your mound?

4 A. Township. I went and saw the zoning guy.

5 Q. Tom who?

6 A. I didn't say Tom. The -- we have a, in  
7 Perrysburg Township, they call them the zoning  
8 director. I can't remember his name, but I went  
9 and asked him.

10 I said, "You know, we are going to  
11 build this mound, what kind of permits do I need  
12 or anything?" And he said, "You don't need  
13 anything as long as you don't have a fence higher  
14 than seven feet." And so we weren't intending on  
15 doing that. We were going to make -- he said,  
16 "If you just do it with dirt, you don't need a  
17 permit. If you want to just raise the grade on  
18 your property, that's fine."

19 Q. How high of a mound were you able to build  
20 with the hundred truckloads of dirt?

21 A. You just seen it here. It's just up to the  
22 top of the railroad, which is probably five feet.

23 Q. So the dirt that you're standing on in  
24 Exhibits F and G, that's the dirt that was  
25 trucked in by you the hundred or so truckloads;

1 is that right?

2 A. Well, you're getting real close to the, you  
3 know, that's right on the line. Whether Ric-Man  
4 did it or we did it, I couldn't tell you because  
5 it's really close. That's, right where that  
6 little fence is and that the property line was.

7 Q. What I'm getting at is the dirt that you dug  
8 up, for example, in Exhibit F to look for what  
9 was under it, that was dirt that you had trucked  
10 in; isn't that right?

11 A. Most of it.

12 MR. ROBON: You're now 30 minutes  
13 past your 20 minutes.

14 (Defendant's Exhibit H marked  
15 for identification.)

16 Q. Let me show you Exhibit H. Can you identify  
17 what that is?

18 A. Well, this is the construction fence.

19 Q. Right.

20 A. I don't see anything.

21 Q. The construction fence and then to the left  
22 of what we are looking at in this picture is the  
23 water pipe, correct? That's on the railroad  
24 property, isn't it?

25 A. No, this has got to be on our property. I



1 think that's -- I don't know what that is.

2 Q. Sir, what I'm trying to show you, as you  
3 look at this picture on the left of this fence,  
4 that goes toward the railroad property, doesn't  
5 it?

6 A. Right.

7 Q. That is where the water pipe is sitting?

8 A. Yes, that's where the --

9 Q. And then to the right of this would be the  
10 Cambridge property, correct?

11 A. Yeah, this is Cambridge over here, and this  
12 is the railroad up here.

13 Q. This is obviously after the clearing had  
14 been done because they're laying the pipe there  
15 to be put in; isn't that right?

16 A. Yeah, this is the --

17 Q. All right. Then this is a view down that  
18 way. Can you tell what direction? Is that  
19 looking back towards the Hospice area, the view  
20 in this picture?

21 A. It appears to be looking towards the  
22 Hospice.

23 Q. What we see there in the foreground right in  
24 front of this picture, you see some vines or  
25 perhaps the brambles and things that have been

1       talked about, isn't that right, in the foreground  
2       right here on the right side?

3       A.   Yes.

4       Q.   Then as you look back in that picture, you  
5       see some mature trees that are grown up there,  
6       correct?

7       A.   Back in here?

8       Q.   Yes.

9       A.   Yes, I see some trees back in there.

10      Q.   Those are standing, and that's after the  
11      clearing was done, correct?

12      A.   I don't know whether they took them down.  
13      Yeah, I think those were left over, and I think  
14      they're still standing, too.

15      Q.   Just a couple more pictures.  Let me show  
16      you Exhibit I.

17                   (Defendant's Exhibit I marked  
18                   for identification.)

19      Q.   That's you in the picture, isn't it?

20      A.   Yes, sir.

21      Q.   And that's your backhoe that you either  
22      hired from Gradel?

23      A.   Right.

24      Q.   Or somebody else, correct?

25      A.   Right.

1 Q. And is that the same hole that you had dug  
2 that we talked about in the earlier pictures?

3 A. Yes.

4 (Defendant's Exhibit J marked  
5 for identification.)

6 Q. On the boom of that vehicle, it says  
7 American Rental?

8 A. Yes.

9 Q. Does that tell you that that's one that you  
10 personally rented?

11 A. Right.

12 Q. As opposed to what Gradel Company did,  
13 right?

14 A. They just operated it.

15 Q. So you obviously trucked a backhoe over  
16 there yourself to this property, correct?

17 A. Yep.

18 Q. And how did you get this onto the location  
19 where it is? Did you go back on the railroad  
20 right-of-way and drive in that way?

21 A. I think with this little machine, we just  
22 brought it down from next door. There's a path  
23 on Lot 16.

24 Q. But the Gradel Company vehicles, those had  
25 to come in from the railroad property in order to

1 get access, right?

2 A. Right.

3 Q. Did you get permission to do that when you  
4 brought in the Gradel Company vehicles or did you  
5 just do it?

6 A. No, we had permission.

7 Q. You did? From whom?

8 A. CSX.

9 Q. Who at CSX?

10 A. I got a letter. We sent them a notice, told  
11 them we weren't going to change their railroad  
12 bed, and if they had any objections, let me know.

13 Q. Do you still have a copy of that letter?

14 A. Yes.

15 MR. FAGNILLI: I'm sorry, is that  
16 letter from them or to them?

17 THE WITNESS: To them.

18 Q. Did you ever get any response from them?

19 A. No.

20 Q. So you sent the letter, and then after that  
21 you brought your equipment in, correct?

22 A. Right.

23 Q. Never actually talked to anybody and got  
24 permission to do this?

25 A. No, I actually talked to somebody, too.

1 Q. Who?

2 A. The real estate guy. I've got his name  
3 down. I can get you his name. They have a real  
4 estates guy, who's kind of like the coordinator  
5 of outside activities.

6 Q. You're going to produce that as well?

7 A. Yeah, I can.

8 Q. Let me show you Exhibit J.

9 (Defendant's Exhibit J marked  
10 for identification.)

11 Q. Do you have Exhibit J in front of you?

12 A. Yes.

13 Q. That's a picture of you walking away from  
14 the photographer?

15 A. Yep.

16 Q. Somebody's operating the backhoe; do you see  
17 that?

18 A. Yes.

19 Q. That appears to be a different hole from the  
20 one that was shown in the earlier exhibits; isn't  
21 that right?

22 MR. ROBON: If you know.

23 A. Well, let's take a look.

24 Q. Let me ask it this way: In picture Exhibit  
25 J we see two holes that are dug or two trenches,

1 or whatever you want to call them, correct?

2 A. Uh-huh.

3 Q. Yes?

4 A. Yes.

5 Q. And the man that's operating the backhoe in  
6 Exhibit J looks like he is pretty close to, right  
7 up against a tree that's remaining and standing  
8 on the property, correct?

9 A. Right.

10 Q. Did he knock that tree over? Did he take  
11 that tree out?

12 A. No, I think that tree is still there.

13 Q. Do you know if when he was doing this  
14 digging shown in Exhibit J, he damaged the roots  
15 or the base of that tree?

16 A. No, we tried to stay away from it.

17 Q. The dirt that he was digging, piling to the  
18 operator's right, is that part of the mound that  
19 you were creating?

20 A. No, this was just to locate the stumps.

21 This was going to go back in the hole whenever we  
22 got back on track on this thing.

23 Q. What we see in Exhibit J is a man operating  
24 a backhoe digging out dirt that you had trucked  
25 in from another location in order to see what was

1           underneath it?

2           A.   Right, to see the trees.

3           Q.   All right.   But the dirt that he is on and  
4           the dirt that you're walking on there, that's  
5           dirt that you had trucked in from the other  
6           location, correct?

7           A.   Like I said, where he is that's definitely  
8           true, but where I am at, you're really close to  
9           the property line.   That was probably there by --

10          Q.   All right.   Let's assume that in this  
11          picture that you're on your own property.   Just  
12          for this picture can you do that, Exhibit J?

13          A.   No, I'm pretty sure this is -- this is the  
14          stakes of the property line, and I'm on the  
15          railroad property.

16          Q.   Where you are is on the railroad property?

17          A.   Yeah.

18          Q.   Are you immediately adjacent to the  
19          Cambridge property?

20          A.   Yes.

21          Q.   So off to your left would be the Cambridge  
22          property?

23          A.   That's right.

24          Q.   So everything from your left out towards the  
25          Cambridge property, all that dirt was what was

1 trucked in by you in the hundred trucks or so you  
2 said from another location?

3 A. You can see the property line right there.

4 Q. Is what I said true?

5 A. All the --

6 Q. The dirt to your left --

7 MR. ROBON: Repeat it.

8 MR. TASSE: Here, I'll do it again.

9 Q. In Exhibit J, was the dirt that's from your  
10 left towards the houses, was that dirt that you  
11 had trucked in?

12 A. No, just from the stakes.

13 Q. Just from what stakes?

14 A. These stakes. See these stakes here?

15 That's the property line. That's what we trucked  
16 in.

17 Q. I'm trying to see what you're --

18 A. It's a little bit different than where I'm  
19 standing. See how I'm a foot or two over? This  
20 is our dirt; this is your dirt.

21 Q. Clearly the man on the backhoe is on top of  
22 dirt that you trucked in from another location?

23 A. That's true.

24 (Defendant's Exhibit K marked  
25 for identification.)



1 Q. Show you Exhibit K, and you recognize this  
2 as being part of the Cambridge property adjacent  
3 to the railroad?

4 A. Yes.

5 Q. All right. Now, that appears to be a  
6 different trench than what we have seen in the  
7 earlier pictures, F to J; is that correct?

8 A. I think it's the same one, same one.

9 Q. Same one as what?

10 A. These two pictures are of the same trench.

11 Q. Which two pictures, the one before it?

12 A. Yes.

13 Q. Exhibit J and K?

14 A. Yes.

15 Q. Are the same trench?

16 A. Yes. It's the same tree, same old tree.

17 Q. Okay, K is just a little bit closer?

18 A. Yes.

19 Q. What was the purpose of digging the ditch in  
20 Exhibit K?

21 MR. ROBON: Objection, asked and  
22 answered five times.

23 A. To see the stumps.

24 Q. No other reason?

25 A. No, that was the only reason.

1 (Defendant's Exhibit L marked  
2 for identification.)

3 Q. Show you Exhibit L. Do you recognize that  
4 as being the same area of the Cambridge property?

5 A. Yes.

6 Q. Would you agree with me that this shows a  
7 longer continuous trench of some sort?

8 A. Yeah, it's the same trench.

9 Q. What did you dig this trench for?

10 A. This is the same trench. See all the vines  
11 and all the stuff coming out? That's what we  
12 were trying to show them.

13 Q. You or your man from Gradel dug this trench  
14 shown in Exhibit L, correct?

15 A. Yes.

16 Q. And it appears to me, but I wasn't there at  
17 the time, that it's a longer ditch that goes the  
18 whole back --

19 A. Right, we connected them.

20 Q. You connected the trenches that you dug?

21 A. Yes, there's a couple holes. We connected  
22 them. We went right down the line to show that  
23 this was where the heaviest trespassing was, and  
24 there was trees that were rooted in Cambridge  
25 property that they tore down.

1 Q. When you dug the trenches shown in Exhibit L  
2 and you placed the dirt off towards the Cambridge  
3 property, did you cover up any of your catch  
4 basins or manholes?

5 A. No.

6 Q. How do you know that?

7 A. Well, we've only got three of them. We  
8 stayed away from them; we needed them.

9 Q. Did anyone ever tell you that you had  
10 covered them up or plugged them in any way?

11 A. No, they were never covered up. Our catch  
12 basins were never covered up; still are not.

13 Q. After you dug the trenching shown in Exhibit  
14 L, what did you do with them? Did you leave that  
15 trench the way it is or did you refill it or what  
16 did you do?

17 A. No, we left it there. We took photos and we  
18 cleared out the bigger stumps that were ten-inch  
19 diameter stumps on Cambridge property. We  
20 cleared it out, and it's still there to this day.

21 Q. What is still there?

22 A. The trench.

23 Q. The trench as we see it in Exhibit L?

24 A. Yes.

25 (Defendant's Exhibit M marked

1 for identification.)

2 Q. Let me show you Exhibit M. Do you have  
3 Exhibit M in front of you?

4 A. Yes, I do.

5 Q. Do you recognize that, either the manhole or  
6 catch basin shown in that picture?

7 A. I think so.

8 Q. Where is that located?

9 MR. ROBON: Are you representing  
10 that's on this property someplace.

11 Q. Yes.

12 A. And this appears to be at -- yeah, this is  
13 at Lot 15.

14 Q. There is also a cable box or a phone box  
15 shown there in that picture, isn't there?

16 A. Yeah, there is a phone and there's a cable  
17 box, both of them.

18 Q. In those boxes and what's depicted in  
19 Exhibit M is from work that you or Gradel Company  
20 have done on your behalf; isn't that right?

21 A. This dirt was from the mound, that's right.

22 Q. Right. And the box that's over on its side,  
23 that's something that you or your Gradel  
24 contractor had done; isn't that right?

25 A. Yeah, they took the top off that time. This

1 was in preparation to raise them up to build the  
2 mound?

3 Q. And this is the last picture I have.

4 (Defendant's Exhibit N marked  
5 for identification.)

6 Q. Showing you what I've marked as Exhibit N,  
7 do you recognize that as views at the back of  
8 your property adjacent to the railroad property?

9 A. Yes.

10 Q. In the top left-hand picture of that, of  
11 this page, as you look down the property line,  
12 you see the trees and some of the vegetation  
13 still there?

14 A. Yes.

15 Q. And the dirt that we see in the picture in  
16 the top left corner of Exhibit N, the dirt to the  
17 right there, that's the dirt that you had trucked  
18 in from the other location, right?

19 A. That's right.

20 Q. The picture directly below that one on the  
21 lower left-hand corner, that's the trench that  
22 you had dug that's shown in the other pictures?

23 A. Yep, yes.

24 Q. And the same if you go to the right side of  
25 the picture in the lower right-hand corner,

1       that's also the trench that you dug with --  
2       either you dug with the backhoe or Gradel Company  
3       dug at your request, right?

4       A.   Yes.

5       Q.   Did you ever speak to anyone from Ric-Man  
6       whenever you were on the premises?

7       A.   Yes.

8       Q.   When did you talk to anybody you identified  
9       as being from Ric-Man?

10      A.   That same period, March or give or take a  
11      month.

12      Q.   Do you know who you spoke to?

13      A.   I have his name; a big guy.  I don't know if  
14      you know that superintendent.  He is their  
15      general superintendent.

16      Q.   So you don't know it as you sit here, but  
17      you have it somewhere else?

18      A.   Yes.

19      Q.   You can provide who you talked to?

20      A.   Yes.

21      Q.   How many times did you talk to somebody from  
22      Ric-Man?

23      A.   Oh, probably three or four times.

24      Q.   Were any of those times alone with you and  
25      the Ric-Man person, or was it always in the

1 company with other folks from Toledo or the  
2 railroad?

3 A. I think most of the time it was with Christy  
4 Soncrant, but I think I talked to -- I talked to  
5 the foreman at least once alone in person, and by  
6 the phone I talked to him. I talked to Steve  
7 Mancini, I think it's Steve Mancini, about trying  
8 to get dirt for the mound. And I talked to at  
9 least two different people from Ric-Man  
10 significantly.

11 Q. You were talking to them about trying to get  
12 dirt from the project in order to use to build  
13 your mound, correct?

14 A. Right, we were talking -- I talked to them  
15 about the crossover pipe, that we needed that,  
16 the field guy I did.

17 Q. The field guy is different from Mr. Mancini,  
18 right?

19 A. Yes. I'll remember his name in a second.

20 Q. The discussions you had about the crossover  
21 pipe, is that essentially the same things that  
22 you talked about with the people from Toledo and  
23 the county, etc.?

24 A. Yes, and I think he was there when we talked  
25 to the county engineer.

1 Q. It was a group?

2 A. Yes.

3 Q. Just so we're clear, you were not present  
4 for any part of the process when the crossover  
5 pipe was unearthed or taken out?

6 A. Right, I was not there.

7 Q. And you were never there at any time before  
8 that area was covered up so you could see what  
9 remained, correct?

10 A. Before what was covered up? Oh, I did not  
11 see the ends of the pipe that they broke off.  
12 All I had was, you know, Christy told me what  
13 happened, that they deliberately cut the pipe.  
14 And, you know, she said, "Well, if you can show  
15 that you needed it, we'll put it back."

16 Q. She also told you that it was plugged and it  
17 was deteriorated and it was decrepit and it was  
18 not in use, didn't she? Isn't that what she told  
19 you?

20 A. Not exactly. I don't think she ever saw it  
21 either. I think she was told that by their  
22 inspector or by Ric-Man and that kind of thing.

23 Q. In fairness to you, you never saw it  
24 unearthed so you don't know what the condition  
25 was underground, do you?



1 A. Well, I saw it in the manhole and I saw it  
2 in the ditch, both ends, I saw it.

3 Q. Right. We talked about what you're going to  
4 try to show us in pictures, right?

5 A. Right.

6 Q. But you never saw it when it was unearthed  
7 and exposed to the elements so you could  
8 visualize it, right?

9 A. Right.

10 Q. And you don't know what condition it was in  
11 when they made the decision to cut it off?

12 A. Well, they told me; they both told me.

13 Q. They told you it was all plugged up and  
14 cracked and not in use, didn't they?

15 A. Not exactly. They said, you know, it would  
16 never work. They implied that it was at least  
17 mainly plugged up.

18 Q. No one ever told you from the City, the  
19 County, Ric-Man, anyone else relating to this  
20 project that that was a fully functioning  
21 drainage pipe under the railroad, did they?

22 A. The County did.

23 Q. What did they tell you?

24 A. That we needed that pipe.

25 Q. No, that's not my question.

1 A. Oh.

2 Q. Did anyone ever tell you at the time that  
3 they unearthed it and made a decision to cap it  
4 off?

5 A. Oh, no, not then.

6 Q. The County told you based on some drawings  
7 he found somewhere back in the --

8 A. That it was there.

9 Q. A long time ago, right?

10 A. That it was there, and that we needed it.

11 Q. He said it was there based on his drawings,  
12 correct?

13 A. Right.

14 Q. But he never told you that it was a fully  
15 functioning working pipe in 2006, did he?

16 A. No, he never was out there.

17 Q. Do you recall any conversations with anyone  
18 from Ric-Man that was inconsistent with what you  
19 talked about or learned from the City of Toledo  
20 or the County with respect to the crossover pipe?

21 A. If Ric-Man was saying something different  
22 than what I heard otherwise? I don't -- you  
23 know, I think that it was consistent with what  
24 their superintendent said it was. From what I  
25 remember, he agreed with them that it was not,

1           you know, not --

2           Q.   Not functioning?

3           A.   Not functioning, he didn't think it was  
4           functioning.  "What the heck do you need it for?"  
5           and that kind of thing.

6                       MR. TASSE:  That's all the questions  
7           I have.  Thanks very much.

8                       MR. FAGNILLI:  I have some  
9           questions, and we've got this other depo coming  
10          in at 3, so I would like to start with --

11                      MR. ROBON:  He was well over an  
12          hour.

13                      MR. FAGNILLI:  I understand.

14                      MR. ROBON:  An hour and a half.  But  
15          please let's not be duplicative.

16                      MR. FAGNILLI:  I just will try to  
17          fill in the issues that are important to my  
18          client and the gaps that I think that there are.

19                      MR. ROBON:  My stomach is growling.

20                               - - -

21

22                               CROSS EXAMINATION

23           BY MR. FAGNILLI:

24           Q.   My name is David Fagnilli, Mr. McCarthy, and  
25           I represent Vermillion Tree and Land Clearing,

1 and I have a few follow-up questions for you. I  
2 just want to clear up a couple of things so that  
3 I understand them.

4 First of all, with regard to these  
5 photographs that we have seen here in response to  
6 Mr. Tasse's questions, and that would be Exhibits  
7 F through N, would show the mound at Lots 15 and  
8 16 that you built. What's the time frame that  
9 that mound was built? Is that shortly after the  
10 clearing was done?

11 A. Yes.

12 Q. And was there a legal survey done by  
13 Peterman & Associates at any time before the  
14 mound was built?

15 A. Before, yes, they came out, and I'm pretty  
16 sure that was before they built the mound. They  
17 came out and verified and put lath, new lath  
18 along some intermediate points rather than just  
19 the main corners. They did come out and do that.

20 Q. Do you know the date that that was done?

21 A. We got a bill from them. I'm sure we could  
22 establish that.

23 Q. And you have the bills for the contractor  
24 that you hired to build the mound as well, right?

25 A. Right.

1 Q. At some point in time, you did some  
2 measurements on your own, I take it, before you  
3 called Peterman?

4 A. Yes.

5 Q. And those measurements, did you take those  
6 from the center of the railroad? Is that how you  
7 established your baseline for your survey?

8 A. We took them from the, yes, from the center  
9 of the active railroad.

10 Q. When Peterman came out and did their survey,  
11 were you present?

12 A. Yes.

13 Q. Did they do the same thing? Did they do it  
14 from the center of the railroad?

15 A. They went -- they had some base control  
16 points. They went back and took it from there,  
17 which these points were taken from the center of  
18 the railroad someplace, but they had a base point  
19 that they used.

20 And then I believe they checked it  
21 against the railroad to make sure. I know they  
22 did because we talked about how his drawings show  
23 101 feet from the active railroad. I came up  
24 with 101 feet; they came up with 101 feet.

25 And they even went further back to

1 check to make sure that their control point,  
2 which I believe was down on Bates Road, that that  
3 was in synch. They checked that out.

4 Q. It's your testimony that the property line  
5 is 101 feet from the center of the railroad?

6 A. I would have to look.

7 Q. The stakes with orange ribbon around them  
8 that are shown in the photographs F through N,  
9 who put those stakes up, do you know?

10 A. I think we've already kind of been through  
11 that. We are not sure whether this was Peterman,  
12 the City. I believe this is Peterman's lath, so  
13 that we can --

14 Q. But you're not sure?

15 A. No.

16 Q. There was at one time a railroad fence that  
17 ran along the railroad right-of-way between the  
18 property line and the -- for the old Cambridge  
19 and the railroad right-of-way; is that correct?

20 A. This railroad tie fence that we're talking  
21 about.

22 Q. There was a, not just a railroad tie fence,  
23 but there was an actual metal fence that ran  
24 along that property right-of-way, and it runs  
25 along the right-of-way all the way to the Maumee

1 River, right, from Bates Road all the way to the  
2 Maumee River.

3 A. No, that fence, that metal fence was on the  
4 face of the railroad ties for that 150 feet, and  
5 that was the only thing left on the Cambridge  
6 property of that old railroad fence, as I recall.  
7 It wasn't continuous down there.

8 Q. Well, is there --

9 A. I shouldn't say. Maybe I never -- but there  
10 was no sign of it or anything.

11 Q. Was there a fence like that to the -- that  
12 exists today to the east of the Cambridge  
13 property?

14 A. There is still some semblances of it there;  
15 there's some little bits of it along there.  
16 Certainly, a hundred years ago, that was up and  
17 standing all the way when this thing was active.  
18 But it wasn't there. At least when I first got  
19 on the scene, that was long gone. The only part  
20 of it was the part that was on the face of those  
21 timbers.

22 Q. Is there a fence like that to the west of  
23 the Cambridge property along the railroad  
24 right-of-way?

25 A. It's not -- it's a newer one, but it's along

1 the -- they do have a fence. I don't know whose  
2 it is, whether it's -- but it's not the same kind  
3 as the old railroad fence.

4 Q. Do you know why the fence isn't there any  
5 longer in the area of the Cambridge property?

6 A. No, I don't.

7 Q. Do you know what clearing was done to put in  
8 the Cambridge property initially?

9 A. I wasn't around for that. The only evidence  
10 we have of that is that the aerial photos show  
11 that it was farm field before and farm field, you  
12 know, development afterwards. It wasn't --

13 Q. Have you seen aerial photographs prior to  
14 2001?

15 A. I believe so.

16 Q. The only aerial photograph I've seen from  
17 Plaintiff's attorney is the one from 2005, which  
18 would be after the development was put in. And  
19 what I'm asking you is if you have any aerial  
20 photographs that you've seen that show the area  
21 before Jacqueline Drive was put in and before the  
22 development was done? Have you seen anything  
23 like that?

24 A. I believe so. I believe that we went and  
25 looked at -- we went over -- it might have been



1        somebody Gary Buck said he went over to -- looked  
2        at the aerials.

3        Q.    Where did he go to look at these aerials?

4        A.    Over at Mannik & Smith, and there was  
5        some --

6        Q.    What is Mannik & Smith?

7        A.    That was a consultant, and they did some of  
8        the environmental stuff on this project. And  
9        they're like the consultant that does aerial  
10       photography around there. He kind of has access  
11       to all the computerized and whatnot.

12       Q.    What consulting did Mannik & Smith do on  
13       what project?

14       A.    They did some environmental review.

15       Q.    For who?

16       A.    For the City of Toledo.

17       Q.    For the water main project?

18       A.    That's the way I understand it. But they're  
19       kind of like the custodian of aerial photography,  
20       and I can't remember whether I saw it or Gary  
21       Buck saw it. This was back before 2005 or before  
22       2000 -- actually 1999 I think is when this  
23       project, the Cambridge project started, that  
24       there were aerial photographs back in that era  
25       that showed that this was farm field.

1                   And the Gillette man next to Cambridge  
2           also confirmed to me that, you know, this was all  
3           farm land long before you guys got here with this  
4           Cambridge project.

5                   So I believe that -- I think all the  
6           clearing or essentially all the clearing was done  
7           before Cambridge got there because it was farm  
8           field from way back.

9           Q.   So is it your testimony that before the  
10          mound was built, there was some survey done by  
11          Peterman & Associates, a legal surveyor, or are  
12          you not sure about that?

13          A.   I'm sure of that.

14          Q.   Before the mound was built, did you or  
15          anyone acting on behalf of Old Granite contact  
16          Vermillion to tell them that the mound was going  
17          to be built?

18          A.   Vermillion?

19          Q.   Yes.

20          A.   No.

21          Q.   Did you or anyone acting on behalf of Old  
22          Granite ever contact anyone at Vermillion to  
23          complain about the clearing and claim there was a  
24          trespass by the clearing at any time before the  
25          mound was built?

1 A. No, we didn't even know Vermillion existed.

2 Q. Did you contact anyone from Edwards Tree  
3 Clearing Service?

4 A. No.

5 Q. Well, you saw the trucks, right, from the  
6 land-clearing company?

7 A. That was afterwards, afterwards.

8 Q. It was before the mound was built?

9 A. Yes.

10 Q. I'm asking you before the mound was built  
11 and after the clearing was done, did anyone  
12 contact anyone from Vermillion or Edwards Tree  
13 Clearing Service to let them know that there was  
14 a complaint about alleged trespassing here?

15 A. We dealt with the City.

16 Q. That's not my question.

17 A. No, we did not go in -- we did not -- I did  
18 not call or contact Edwards or Vermillion.

19 Q. And that's true for both the claim that  
20 there was a trespass and the notice that there  
21 was going to be this filling or this mounding  
22 done on the property line?

23 A. That's right, I did not contact them.

24 Q. Did you take any photographs of any stumps  
25 or roots that you claim were cleared on the

1 Cambridge property or the Old Granite property at  
2 any time before this fill was put in?

3 A. Yes, yes.

4 Q. And you have those photographs?

5 A. Yes, I do. Hope we got all of them.

6 Q. Do you know if any of those photographs have  
7 been deleted or altered in any way?

8 A. I hope not.

9 Q. Do you know?

10 A. No, I don't know.

11 Q. What have you done to preserve those  
12 photographs to ensure that they won't be deleted  
13 or altered?

14 A. Well, I gave them to the City of Toledo, for  
15 one thing.

16 Q. When did you give them to the City of  
17 Toledo?

18 A. Right after we took them, right before we  
19 did the mound.

20 Q. Did you give them to them in electronic  
21 format or did you give them to them in printed  
22 format?

23 A. Both.

24 Q. So they should have a disk with all these  
25 photographs?

1       A. I didn't say all. We went and we tried to  
2       go with the City of Toledo. We went -- before we  
3       did this mound, we took all the pictures, we  
4       brought them out. I gave Christy the main photos  
5       that showed these stumps clearly on Cambridge  
6       property, trees going in 20 feet.

7               We shared it with them. We tried to  
8       have a joint survey. They didn't want to do  
9       that, but they did, they and Ric-Man did come  
10      back and put more stakes in. And they lined up  
11      with ours.

12             So we did make an effort before we did  
13      this mound to bring them out, and Ric-Man  
14      certainly was there. And I don't know, maybe  
15      Vermillion was gone by this time.

16             But we made a conscientious effort to  
17      get everybody to see all of the trespass stumps  
18      that we had through there, plus all the vines  
19      that were sticking up that you can still see from  
20      some of these. We did do that.

21      Q. You're not answering my question. I want  
22      you to listen to my question very carefully and  
23      answer the specific question I'm asking you  
24      rather than get off on a tangent, okay? You have  
25      to answer out loud, yes or no.

1 A. Yes.

2 Q. What I'm asking you is with regard to my  
3 client, Vermillion and Edwards. Did you ever --  
4 first of all, you knew -- you saw the trucks that  
5 said Edwards Land Clearing Service?

6 A. Machines; I never saw any of the trucks.

7 Q. You saw a low-boy that they were being  
8 loaded onto, right? You said you talked to the  
9 low-boy driver.

10 A. Yeah, but I don't know if that had the cab  
11 there, but I saw -- the only place I remember  
12 seeing Edwards was on the machines themselves,  
13 but whatever.

14 Q. Did you ever make any attempt to contacted  
15 Edwards or Vermillion Land Clearing Service or  
16 find out who the land clearer was before this  
17 mound was built? I think your answer to that was  
18 no.

19 A. But you slipped one other thing in there.

20 Q. What's that?

21 A. Did I ever -- you said -- I mean, I did not  
22 call them. I did not -- before or after, I don't  
23 think I've ever contacted Vermillion.

24 Q. Right.

25 A. Other than seeing their truck out there, the

1 machine out there and taking pictures. But I did  
2 not have any contact with them, if that's your  
3 question.

4 Q. Your contact was strictly with the City of  
5 Toledo and with Ric-Man?

6 A. Right.

7 Q. You never followed up to find out who the  
8 land clearer was and to try to put them on notice  
9 at some time before you did all of this fill; is  
10 that correct?

11 A. That was kind of the new part, but I did try  
12 to find out who the clearing company was.

13 Q. What did you do to try to find that out?

14 A. I think I asked Christy Soncrant.

15 Q. Did she tell you?

16 A. Yes.

17 Q. Then what did you do? Did you try to  
18 contact them?

19 A. No, I didn't try to contact them. I just  
20 wanted to find out who it was since, you know,  
21 that was the actual party that did the tree  
22 clearing.

23 Q. But you never tried to give them any notice  
24 before you put in this fill over the area where  
25 you claim the clearing had been done?

1 MR. ROBON: Asked and answered.

2 THE WITNESS: But the question is  
3 screwed up.

4 MR. ROBON: Tell him yes or no.

5 A. Where the trees were taken out, the part I  
6 think we got -- the trees were taken out on  
7 Cambridge property, the trees were taken out on  
8 their property. I did not go and contact them  
9 and try to get into this whole thing about where  
10 it was, but you made it sound like I -- we built  
11 this mound over the trees.

12 MR. ROBON: Don't worry what it  
13 sounds like. Did you contact them?

14 THE WITNESS: I did not contact  
15 them.

16 MR. ROBON: Thank you.

17 Q. You said you did have some contact with  
18 someone at the site that you thought was either  
19 an Edwards or a Vermillion employee that worked  
20 for the land clearer; is that correct?

21 A. I think so.

22 Q. Who was that?

23 A. I don't know. I think it might have been  
24 somebody, like I said, with a -- picking up the  
25 machine or had a low-boy there they were taking



1 it away because somebody said something about --

2 MR. ROBON: You have answered his  
3 question.

4 A. Okay.

5 Q. What do you remember about the conversation  
6 with him?

7 A. Nothing. It was just a driver or something.  
8 He didn't know anything about it. Maybe --

9 MR. ROBON: You've answered the  
10 question. Please, answer the question. We will  
11 be here all day.

12 MR. FAGNILLI: Marv, these are the  
13 photographs that you used at the Wood County  
14 Engineer's deposition. I just wanted to ask him  
15 about those. They're your photographs.

16 Q. Show you what was --

17 MR. FAGNILLI: I don't know how  
18 these were marked, but maybe we can put an  
19 exhibit sticker on this.

20 (Defendant's Exhibit O marked  
21 for identification.)

22 Q. I'm going to mark this on the back here as  
23 Exhibit O. This is a photo of you standing next  
24 to this, to this manhole cover. Do you see that?

25 A. Right.

1 Q. And do you know the date that this photo was  
2 taken? It shows the date of December of 2007 on  
3 the back. That's the date it was printed out,  
4 December 11, 2007. It doesn't show the date that  
5 it was taken. Do you know the date that it was  
6 taken?

7 MR. ROBON: Yes or no.

8 A. No, I guess I don't.

9 Q. This is a photo of you standing next to the  
10 manhole that we were talking about earlier today,  
11 right?

12 A. Right, but this is -- I mean, it's --

13 MR. ROBON: You've answered the  
14 question, yes or no.

15 A. 2007.

16 Q. Was this 2006 or 2007?

17 A. 2007.

18 Q. So this is after the job has been finished?

19 A. Yes.

20 Q. This is not before the clearing was done?

21 A. Right.

22 Q. And the railroad fence is visible in the  
23 background?

24 A. Right, this is what's left of it, that  
25 little bit.

1 Q. On the other side of the railroad fence,  
2 that would be the Cambridge property or is that  
3 the Gillette property?

4 A. This is the Gillette property.

5 (Defendant's Exhibit P marked  
6 for identification.)

7 Q. I showing you what we marked as Exhibit P.  
8 That's another photograph. I think it's number  
9 seven out of that same packet of photos that  
10 Mr. Robon has given us. This shows the manhole  
11 again, right?

12 A. Yes.

13 Q. And it shows Lot 15, your son's house, in  
14 the background, correct?

15 A. Yes.

16 Q. And it also shows the railroad fence in the  
17 shrubbery there?

18 A. Yes.

19 Q. And the brush?

20 A. I don't know if you can see it, but there is  
21 bits and pieces of it there, yes.

22 Q. And that photo again was taken in 2007?

23 A. Yes, I believe so.

24 Q. So this would be after the clearing was  
25 done, after all of the work was done?

1 A. Right.

2 Q. Is that correct?

3 A. Yes.

4 Q. Going back to the photos that Mr. Tasse  
5 showed you, Exhibits F through L, and those are  
6 the photos that show you in the pictures. Who  
7 took those photos?

8 A. I don't know.

9 Q. So we don't know who took the photos and we  
10 don't know the date that they were taken; is that  
11 fair to say?

12 A. Well, we took the other --

13 MR. ROBON: Yes or no. Answer his  
14 question.

15 A. We know that this is -- this is 2006. The  
16 other ones are --

17 MR. ROBON: No, the question is do  
18 you know who took the picture.

19 Q. And do you know the date?

20 A. 2006, I don't know.

21 MR. ROBON: Thank you.

22 A. And I believe the pictures were taken by  
23 Ric-Man.

24 Q. I'm not talking about the Exhibits N and M.  
25 I'm talking about --

1 A. Yeah, these.

2 Q. Exhibits F through L, you think those were  
3 taken by Ric-Man?

4 A. I believe so.

5 Q. You worked with the City of Toledo in your  
6 job as -- with the Army Corps of Engineers; is  
7 that correct?

8 A. Yes.

9 Q. Did you have someone who was your primary  
10 contact over there?

11 A. Yes.

12 Q. Who was that?

13 A. The main one in engineering at the time was  
14 Dave Young and Burt Lydy (sic).

15 Q. Are they still there?

16 A. No.

17 Q. Is there anyone that's still there that you  
18 would have had contact with?

19 A. Carty has them all shifted around. I don't  
20 know.

21 Q. I'm sorry?

22 MR. ROBON: Just yes or no.

23 A. I don't know.

24 Q. Other than engineering, was there anyone  
25 else that you had regular contact with from the

1 City of Toledo on this project?

2 A. Yes, I had contact with their sewer people,  
3 all their departments. We are building some  
4 major projects with them, so we did all the  
5 technical service, and Bill Franklin and just  
6 about every department that had anything to do  
7 with physical things, roads, whatever.

8 Q. Did you ever have contact with Christy  
9 Soncrant before you were involved in this  
10 project?

11 A. No.

12 Q. Why did you stop building the mound? Why  
13 did you discontinue that?

14 A. Well, the main thing was that we were -- it  
15 was alleged that we were covering it up, that we  
16 were covering up the evidence. And that in all  
17 the pictures we took beforehand, now that the  
18 City was starting to say, "Oh, it was only a few  
19 trees or something like that." So after we  
20 started, we stopped so we didn't cover up  
21 anything further.

22 Q. You covered up the property line along Lot  
23 15 and 16; is that correct?

24 A. Oh, I don't think so. This is --

25 MR. ROBON: You've answered the

1 question.

2 Q. Well, don't these photographs show that  
3 there is a mound of dirt that runs all the way  
4 along the back of Lots 15 and 16?

5 A. Right, but that's a --

6 MR. ROBON: Listen to his question.

7 Q. Is that correct or isn't it?

8 A. Yes.

9 MR. ROBON: Lot 16? Are you getting  
10 tired? Do you want a break?

11 A. No, 16, part of Lot 16 was on there.

12 Q. And Lot 15 is completely covered at the  
13 property line?

14 A. We didn't put anything on the -- this dirt  
15 on the railroad property was put there by  
16 Ric-Man, not us.

17 Q. But the dirt -- you put dirt along the  
18 property line along 15 and 16?

19 A. On the Cambridge side, yes.

20 Q. How about the lots to the west of those?  
21 Did you cover those lots as well?

22 A. No.

23 Q. Just Lots 15 and 16?

24 A. 15, 16 and I think we might have been a few  
25 feet into 14.

1 Q. You said something about 20 foot of  
2 vegetation onto Cambridge or a tree 20 foot over.  
3 Are you claiming the tree stumps were 20 foot  
4 into the Cambridge property?

5 MR. ROBON: Asked and answer three  
6 times.

7 MR. FAGNILLI: But he made the  
8 statement again, and I would like to clear this  
9 up.

10 Q. Are you claiming that the roots and the  
11 stump was into the Cambridge property or are you  
12 claiming that the overgrowth was onto the  
13 Cambridge property?

14 A. The overgrowth, in my opinion, was onto  
15 Cambridge property by 20 feet.

16 Q. So it's your position that if there is a  
17 tree that has its stump on the railroad  
18 right-of-way and it overhangs onto the Cambridge  
19 property, the railroad doesn't have the right to  
20 remove the tree?

21 MR. ROBON: Objection, that's not  
22 what he ever said.

23 MR. FAGNILLI: That's what I'm  
24 trying to find out.

25 MR. ROBON: He's asked the question;



1 he's answered it three times.

2 MR. FAGNILLI: No, he hasn't.

3 MR. ROBON: Every lawyer's.

4 MR. FAGNILLI: I'm trying to  
5 understand.

6 A. I don't think that.

7 Q. What do you think?

8 A. They could have a right to take those trees  
9 out if they did their homework right, you know.  
10 But as far as the land thing, I understand that.  
11 We have done a lot of clearing.

12 MR. ROBON: You answered the  
13 question.

14 Q. It's not your position that they can't clear  
15 the trees off of the railroad property; is that  
16 correct? They have a right to do that, the  
17 railroad has a right?

18 A. I didn't say that they do.

19 MR. ROBON: Are you talking about  
20 trees in the wetlands or regular trees?

21 MR. BAHRET: Objection.

22 MR. FAGNILLI: I'm not talking about  
23 wetlands. Forget about the wetlands.

24 A. Just from a land property aspect, that's  
25 true.

1 Q. They could clear the trees that are on their  
2 property, even if they overhung onto the  
3 Cambridge property; is that correct?

4 A. If this was just a land property deal, yes.

5 Q. Now, you're not an expert in wetlands  
6 regulations; is that correct?

7 MR. ROBON: Asked and answered  
8 three times.

9 MR. FAGNILLI: It's the basis for  
10 another question, Marv.

11 MR. ROBON: Already asked and  
12 answered.

13 MR. FAGNILLI: No, it isn't. Marv,  
14 if you have an objection, make it and let's go.

15 A. No, I don't claim to be.

16 Q. Is it your contention that there was  
17 permanent standing or flowing bodies of water on  
18 the railroad right-of-way that flowed into  
19 navigable waters?

20 A. That you need a -- that's the kind of thing  
21 you need an expert to tell you just what that all  
22 means.

23 Q. Well, from your observation?

24 MR. ROBON: Can you answer it, yes  
25 or no?

1 Q. From your observation, was there any  
2 permanent or standing or flowing bodies of water  
3 on the railroad right-of-way?

4 A. Yes, there were.

5 Q. There's permanent standing or flowing bodies  
6 of water?

7 A. Yes.

8 Q. Is there permanent standing flowing bodies  
9 of water on the railroad right-of-way now?

10 A. Yes.

11 Q. Where?

12 A. The center ditch.

13 Q. Other than the ditch?

14 A. No, other than the ditches, that's not true.

15 Q. So the only standing or flowing bodies of  
16 water on the railroad right-of-way would be the  
17 ditch; is that correct?

18 A. Ditches, yes.

19 Q. There is more than one ditch?

20 A. On either side.

21 Q. But there is only one side that was cleared?

22 A. They cleared both sides.

23 Q. Both sides of the ditch?

24 A. Both sides of the railroad embankment, on  
25 the Cambridge side and the center ditch side.

1       There were trees over there too. They took them  
2       down.

3       Q. Other than the water that was in the ditch,  
4       there was no other standing or flowing permanent  
5       bodies of water; is that correct?

6       A. That is correct.

7       Q. Is it your contention that in order to clear  
8       trees, absent earth moving, in order to clear  
9       trees from an area adjacent to wetlands, you need  
10      a permit from the Army Corps of Engineers?

11      A. Say that again.

12                   MR. ROBON: Objection to the form.

13      Q. If you were clearing trees on an area  
14      adjacent to a wetland, do you need a permit from  
15      the Army Corps of Engineers if you're not going  
16      to be disturbing earth?

17                   MR. ROBON: Objection. You're  
18      saying adjacent; you mean within the wetlands.

19                   MR. FAGNILLI: No, that's not what I  
20      mean.

21      A. No, I don't think -- I don't believe there  
22      is anything that says if you're adjacent to it.

23      Q. If you're within a wetland and you're  
24      clearing trees but not disturbing earth, do you  
25      know if there is any requirement to get an Army

1 Corps of Engineers permit?

2 A. I believe there is.

3 Q. Do you know -- what do you base that on?

4 A. I worked with the Army Corps of Engineers  
5 for a long time. I actually worked in this  
6 department for a while, so I know that those kind  
7 of things are pretty obvious.

8 Q. Are you familiar with the United States  
9 Supreme Court decision in Rapanos versus United  
10 States that came out in 2006?

11 A. Yes.

12 Q. And what is your understanding of Rapanos?

13 MR. ROBON: Objection, calls for a  
14 legal conclusion.

15 MR. FAGNILLI: He says he was  
16 familiar with it.

17 Q. What is your understanding of it?

18 A. We reviewed that thing on another matter,  
19 and it didn't seem to have any bearing on this  
20 case or anything else that we were working on.  
21 That's all I can remember about it.

22 Q. What did you review it on? What matter did  
23 you review it on?

24 A. Some shoreline job.

25 Q. The project you were doing in Port Clinton?

1 A. Yes.

2 Q. Who were you doing that project for?

3 A. For Howard Emery.

4 Q. Is that project going forward?

5 A. No, it's on hold.

6 Q. Why is it on hold?

7 MR. ROBON: Objection, irrelevant.

8 If you know.

9 A. He needs a permit.

10 Q. And he can't get it? You have to answer out  
11 loud.

12 A. Yes.

13 Q. Why can't he get it?

14 MR. ROBON: Objection, irrelevant.

15 A. It would be all afternoon.

16 Q. What is your date of the birth?

17 A. 2/22/46.

18 Q. You mentioned that you testified on maybe a  
19 dozen times as a witness. That was all for the  
20 Army Corps of Engineers; is that correct?

21 A. Yes, that's what I was talking about.

22 Q. Have you ever testified in court or in a  
23 deposition other than in your capacity as in the  
24 Army Corps of Engineers?

25 A. I can't remember.

1 Q. Have you ever been a party to litigation  
2 before? Have you ever been sued by anyone, has  
3 anyone ever sued you?

4 MR. ROBON: Objection. You can  
5 answer.

6 A. No.

7 Q. Have you ever developed any real estate?

8 A. Personally, no; my own home.

9 Q. Did you do any consulting work while you  
10 were employed by the Corps of Engineers?

11 A. No, I didn't.

12 Q. Were you involved in any construction work,  
13 any development work on the side during the time  
14 that you were working for the Corps of Engineers?

15 A. Occasionally.

16 Q. What construction work were you involved in  
17 during the time period you were working for the  
18 Corps of Engineers?

19 A. I did some electrical contracting once. I  
20 did some consulting on, like I said here earlier,  
21 for mobile home, some problems a guy had with  
22 some mobile home sites.

23 Q. That's while you were with the Corps? I  
24 understood that to be afterwards.

25 A. No, I did that some of that before, too, but

1           they were minor kind of things. I basically  
2           worked for the Corps.

3           Q. Your son, Michael, is the one that lives in  
4           Lot 15; is that correct?

5           A. Yes.

6           Q. And has he been involved in the construction  
7           business? I know he is a real estate broker, but  
8           has he also worked in the construction business?

9                       MR. ROBON: If you know.

10          A. No.

11          Q. Have you been involved in developing any  
12          property with him?

13          A. No.

14          Q. Who was your supervisor at the Army Corps of  
15          Engineers?

16          A. When I left?

17          Q. Yes.

18          A. My last one? His name was -- I can't even  
19          remember -- John Rintoul, R-i-n-t-o-u-l.

20          Q. Spell that last name again for me, sir.

21          A. R-i-n-t-o-u-l.

22          Q. Was he located here in Toledo?

23          A. No, he was in Buffalo, New York.

24          Q. Were you in charge of the Toledo office  
25          then?



1 A. Yes, I was.

2 Q. Are you familiar with a Hydro-Axe?

3 A. Yes.

4 Q. Have you ever seen those used before?

5 A. Yes.

6 Q. When?

7 A. Oh, many times, and Edwards, your company,  
8 too. I believe they did a lot of the clearing we  
9 had out in the boondocks. I think in Sandusky  
10 and I don't know when else, but they're quite a  
11 major clearing company around here.

12 Q. You had seen Vermillion or Edwards use a  
13 Hydro-Axe before on projects when you were at the  
14 Corps?

15 A. Yes.

16 Q. Were they a direct contractor with the Corps  
17 or did they contract with --

18 A. They were a sub.

19 Q. Have you ever talked to anyone at Edwards or  
20 Vermillion directly?

21 A. I -- in the past I can't remember. Probably.

22 MR. ROBON: You've answered the  
23 question.

24 Q. With regard to the Hydro-Axe, what do you  
25 know about it as far as using it for clearing and

1 so forth?

2 A. Well, in our line of work, we didn't use a  
3 Hydro-Axe in residential areas. We didn't allow  
4 that.

5 Q. Was there some Corps requirement that said  
6 it wasn't permitted?

7 A. I don't know if there was any specific  
8 mention of that. There is all kinds of different  
9 equipment, but, generally speaking, forestry type  
10 equipment is not allowed to be used around  
11 residential areas.

12 Q. Do you know of any regulation or requirement  
13 on that?

14 A. The closest thing would be in our specs we  
15 used to call it suitable equipment, and that was  
16 it.

17 Q. Did your Army Corps of Engineers  
18 specifications identify what suitable equipment  
19 was?

20 A. We didn't have a list of it, no.

21 Q. Do you recall any occasion where someone  
22 wanted to use a Hydro-Axe and you told them no?

23 A. No.

24 Q. And is a Hydro-Axe specifically excluded in  
25 any regulation that you're aware of?

1 A. No.

2 Q. You don't consider yourself an expert in  
3 land clearing methods, do you?

4 A. I don't know what an expert would be on land  
5 clearing, but I'm not a clearing expert, no, I  
6 guess.

7 Q. Who's the trucking company that trucked the  
8 dirt from Five Points to this project?

9 A. I promise I'll get his name.

10 Q. You don't know?

11 A. I can't remember.

12 Q. Did you pay for that dirt, or was that dirt  
13 given to you just to get rid of it?

14 A. Paid for it.

15 Q. Do you know what you paid for it?

16 A. I can't exactly remember.

17 Q. Do you know what type of soil it was? Was  
18 it evaluated in any way?

19 A. No, it was from Perrysburg.

20 Q. Did you have any test done on it to  
21 determine what it was, whether it was clay or  
22 something else?

23 A. No, just went and looked at it and had it  
24 shipped.

25 Q. Have you prepared any written report of your

1 opinions for either Mr. Robon or for Old Granite?

2 A. I sent a few letters to the City and that.

3 We have positions that I took back when, when we  
4 were trying to get this thing resolved last year,  
5 in 2006.

6 Q. Anything since 2006?

7 A. No, we haven't sent them anything.

8 Q. Was there a survey that was done by Peterman  
9 & Associates sometime after these photographs  
10 were taken which we have marked as Exhibits F  
11 through N?

12 A. Yes, they came back and did another survey.  
13 They have two surveys out there; they came out  
14 there twice. They did a survey specifically on  
15 each of the trees that were on Cambridge  
16 property, made a map and that kind of thing of  
17 all the trespass kind of clearing stumps. They  
18 surveyed each one of them, went through all that  
19 trouble.

20 Q. I show you what was marked as Exhibit E.  
21 You have that in front of you, don't you? That's  
22 the photo that has the concrete monument?

23 A. Monument, yes.

24 Q. Do you know the date this photograph was  
25 taken?

1 A. I think we just went over this. This was --  
2 oh, no, we didn't. Surely this was early 2006,  
3 but --

4 MR. ROBON: Do you know? Do you  
5 have any idea? It could have been -- you don't  
6 know, do you?

7 MR. BAHRET: He just gave an answer.  
8 How can you tell him he doesn't know?

9 MR. ROBON: I'm tired and hungry  
10 and he is tired and hungry.

11 Q. Are you tired and hungry, sir?

12 A. Yes.

13 Q. Take a break then. Do you need to take a  
14 break?

15 A. I don't need to take a break. I would just  
16 as soon get out of here.

17 Q. Okay.

18 MR. ROBON: How much longer is this  
19 going to go on?

20 MR. FAGNILLI: I'm almost --

21 A. But this is clearly, you know, early 2006,  
22 first half of 2006, if that helps you.

23 Q. That's what I want to know. You believe  
24 that this is -- do you know who took the  
25 photographs?

1 A. No.

2 Q. Do you believe this is the monument for Lot  
3 15?

4 A. I said I couldn't tell whether it's Lot 9 or  
5 Lot 16.

6 Q. There is a railroad fence that's shown on  
7 the right-hand side of the photograph. See that?

8 A. Oh, yeah. So it is Lot 16.

9 Q. And does that railroad fence still exist?

10 A. Yes.

11 Q. Do you know if this is looking east or west?

12 A. This would be looking east.

13 Q. And the brush that's on the ground on the  
14 left-hand side of photograph, is it your  
15 contention that that's the Cambridge property?

16 A. Yeah, you can see the fence there.

17 MR. ROBON: Well, that's what I'm  
18 saying. Don't guess what it says.

19 Q. You can see the fence there?

20 A. Yeah, you can.

21 Q. You can see the steel wire between the  
22 railroad ties if you look.

23 MR. ROBON: I sure as hell don't  
24 see it.

25 MR. FAGNILLI: I'm not asking you,

1 Marv.

2 MR. ROBON: It looks like tree  
3 limbs to me.

4 A. And just so you understand, this is --

5 MR. ROBON: You answered the  
6 question.

7 THE WITNESS: He asked me another  
8 question.

9 MR. FAGNILLI: I did ask him another  
10 question before you interrupted, Marv.

11 Q. Would you answer the question, please?

12 A. But you said to the left. We have to  
13 clarify that.

14 Q. Yes.

15 A. This is a corner monument of the property,  
16 okay? The Cambridge property comes like this and  
17 like this, okay?

18 Q. Okay.

19 A. This is Cambridge property, this is, you  
20 know, Gillette property over here.

21 MR. ROBON: Let the record indicate  
22 he is indicating the left side of the picture as  
23 Cambridge property.

24 MR. FAGNILLI: I think that's what I  
25 asked.

1 Q. And it doesn't show any clearing on the  
2 Cambridge property in the photograph; is that  
3 correct?

4 A. You know, they didn't --

5 MR. ROBON: Yes or no?

6 A. I think --

7 MR. ROBON: Can you tell, yes or  
8 no? Not what you think.

9 A. I would have to say it was right on the  
10 border. I really don't know whether they reached  
11 in here and took this out or whether we cleared  
12 all this. I really can't say for sure.

13 Q. You just don't know one way or the other?

14 A. I don't know one way or the other.

15 Q. You believe that this stake was put up  
16 sometime after the clearing was done, is that  
17 correct, the stake that's showing in Exhibit E?

18 A. Yes.

19 Q. When you first went out after the clearing  
20 was done, did you see any survey stakes on the  
21 property line with ribbons on them along the  
22 Cambridge property and the railroad right-of-way?  
23 You told us that you saw the painting on the  
24 trees. Did you see any of those ribbons?

25 A. I think we also went through that. I didn't



1       see -- I don't recall seeing lath. I mean, it  
2       was all pulled out; it was cleared. So I don't  
3       believe I saw any City lath, anything that was on  
4       the ground at that time.

5       Q. Did you take photos the first day that you  
6       saw this?

7       A. I don't know.

8       Q. Again, I asked you these questions. Marv  
9       interrupted before we got through with this. I  
10      would like to get through with this. I want to  
11      know what you've done to preserve those  
12      photographs so that we can be sure of the  
13      integrity of the photographs that were taken, the  
14      date they were taken, who took them and that they  
15      haven't been altered.

16               MR. ROBON: Don't answer it.  
17      They've asked you three times. I'm tired of it.

18               MR. FAGNILLI: You've never let him  
19      answer the question.

20               MR. ROBON: He left them in his  
21      computer is what he said and he gave some to the  
22      City.

23      Q. But you never let him answer the question as  
24      to what he did to preserve the integrity of those  
25      photographs.

1 MR. ROBON: If he did anything. Go  
2 ahead and answer. Let's get out of here.

3 A. I did my best. I filed them. I got some  
4 copies in the file. I have them on my computer.  
5 I said earlier people screw around with your  
6 computer. I don't know how much I got there. I  
7 have to have my son -- my son kind of helps me  
8 with my computer to see just what I got in there,  
9 what I don't.

10 Q. Do you have a different computer now than  
11 you had back in spring of 2006?

12 A. Yes, I got a whole new set-up, whole new  
13 program and that kind of thing.

14 Q. Did you throw the old box away?

15 A. No, we just put new programs in it.

16 Q. You didn't get a new computer box?

17 A. No.

18 Q. Did you switch from like Windows XP to  
19 Windows Vista or something like that?

20 A. I went to XP and some other things.

21 Q. What kind of camera did you have, digital  
22 camera?

23 A. I have a -- I got a cheap one. We had three  
24 cameras.

25 MR. ROBON: Do you know what kind

1 it is? That's what he asked you.

2 A. I don't know the brand.

3 Q. What other cameras were used to take these  
4 photographs other than the cheap one you don't  
5 know the brand?

6 A. We have -- my son's got one, it's a good  
7 one, and I had another one at my house a friend  
8 of mine lent me that was better quality.

9 Q. Do you know what kind that is?

10 A. No, I don't know what kind that one is.

11 Q. Were all of those photos downloaded onto to  
12 your computer?

13 A. Yes. All those that I took with my camera  
14 or my friend's camera were downloaded on mine.  
15 My son would have -- he sent me some, and he  
16 downloaded them on his computer.

17 Q. Now, when you take them on a digital camera  
18 like that, you save them on a little disk that's  
19 in the camera, right?

20 A. Yes.

21 Q. Have you erased the disk that's in the  
22 camera?

23 A. Yes, my cheap one I did because it only gave  
24 you 30 or whatever. The other one, like I say,  
25 the one belongs to my friend, that's -- we might

1 be able to get at that disk. He could save  
2 hundreds, and he may have put in different disks  
3 or something, but --

4 Q. Who's the friend?

5 A. My friend is Tom Heinemann, my neighbor, and  
6 we have a -- and my son.

7 Q. Does he live on the same street you live on?

8 A. Down two blocks.

9 Q. Where does he live?

10 A. He lives on Sandusky Street.

11 Q. Did you keep any kind of a log that would  
12 tell you the dates when they were taken, the  
13 photos were taken?

14 A. Yes, I think all my cheap ones, they printed  
15 right on the picture.

16 Q. We have seen some digital photographs that  
17 your lawyer has given us today that don't have  
18 the date printed on them. So that's why I'm  
19 wondering, is there some other record when the  
20 photographs were taken?

21 MR. DAVIS: Objection, I don't  
22 believe that Counsel has provided any photographs  
23 today.

24 MR. FAGNILLI: No, this Counsel  
25 provided us. Plaintiff's counsel provided us

1 with photographs.

2 MR. ROBON: At a previous  
3 deposition, but not today.

4 MR. FAGNILLI: Previous deposition  
5 that we showed him today that don't have dates on  
6 them. So I'm trying to figure out how we are  
7 going to be able to determine the dates these  
8 photographs were taken, and is there any  
9 independent log of the dates the photographs were  
10 taken.

11 A. I would have to look. We have -- certainly  
12 the ones that we have hard copies of, we did date  
13 them. You know, it's a year ago.

14 Q. How many photos are there altogether?

15 A. Oh, I'd guess there's 100, 200.

16 Q. How long have you lived at the 529 Loomis  
17 Drive address in Perrysburg?

18 A. Since '85, 22 years.

19 Q. No further questions.

20 (Recess taken.)

21 - - -

22 CROSS EXAMINATION

23 BY MR. WAGONER:

24 Q. Mr. McCarthy, my name is Greg Wagoner. I'm  
25 an attorney for CSX Transportation. I'm going to

1 ask you a few questions as well. The same rules  
2 apply. If anything is unclear, let me know, is  
3 that fair?

4 A. Yep.

5 Q. If you don't understand something -- but if  
6 you answer something, I'll assume you understood  
7 it. Is that also correct?

8 A. Yep, yes.

9 Q. Who have you talked to at CSX about Old  
10 Granite development?

11 A. Probably three people.

12 Q. Who?

13 A. Gene Wheeler.

14 Q. Who's Gene Wheeler?

15 A. He was the road master.

16 Q. Road master where?

17 A. He told me he was road master from  
18 Perrysburg to Dayton. That was 2006.

19 Q. Where was Gene Wheeler out of?

20 A. Dayton. I think he told me Dayton somewhere  
21 because he had to drive all the way from Dayton  
22 to meet with me. This is at the very end of his  
23 jurisdiction or his line is Bates Road, so  
24 he's --

25 MR. ROBON: You've answered the

1 question. What's the next guy?

2 MR. WAGONER: Hold on. I'm not  
3 done.

4 MR. ROBON: Well, you said you were  
5 going to just ask three --

6 MR. WAGONER: Yeah, I know, but I  
7 was asking a question about Mr. Wheeler. How did  
8 you get in touch with Mr. Wheeler?

9 A. Now, names are starting to come back. Dan  
10 Murphy was the real estate guy. I'm pretty sure  
11 that was his name.

12 Q. He was an employee of CSX Transportation?

13 A. Yes, in Jacksonville, I think.

14 Q. How did you get in touch with Mr. Murphy?

15 A. There is another guy, who I definitely can't  
16 remember his name, but I do have it written down,  
17 and I can produce the names of the guys I talked  
18 to down in Jacksonville, one of the -- I don't --  
19 it seems he was some kind of coordinator in  
20 Jacksonville.

21 Q. Coordinator of what?

22 A. Like adjacent property owners or whatever,  
23 something like that. He was the one that told me  
24 all this, how this whole thing works. I was  
25 calling them to find out, you know.

1 Q. How what whole thing works?

2 A. Like the drainage, and what was the deal on  
3 the City of Toledo coming down your railroad  
4 line, and about bringing the trucks over the  
5 railroad bed.

6 Q. What trucks?

7 A. The ones when we started building this  
8 mound.

9 Q. The 120 truckloads of dirt?

10 A. One hundred truckloads.

11 MR. ROBON: It was a hundred.

12 Q. A hundred truckloads of dirt. Is this the  
13 individual that you wrote the letter to that you  
14 talked about earlier?

15 A. I think the letter was to Dan Murphy. He  
16 seemed to be the main coordinator and was quite  
17 helpful on how all these things go. But I think  
18 the name was Dan Murphy. The letter was sent to  
19 him asking them for permission to come on that  
20 little stretch for so many months or something.  
21 That's really the three. I think I had three  
22 contacts with CSX.

23 Q. So those are three individuals you talked  
24 to, correct?

25 A. Yes.



1 Q. How frequently did you talk with them?

2 A. I talked to Dan probably three or four  
3 times, and I talked to Gene once in person and on  
4 the phone once or twice. And the guy in  
5 Jacksonville, the coordinator for this area, I  
6 sent him stuff. He sent me -- I remember he  
7 faxed me some stuff, so I was in touch with him.  
8 Talked to him probably just once, but we went  
9 back and forth on like that.

10 Q. Did you communicate via e-mail at all?

11 A. I don't think with CSX, no. By fax I think  
12 we did.

13 Q. So the only communication that you have with  
14 CSX written was the one letter that you sent  
15 regarding the hundred truckloads of dirt?

16 A. No, I had more than that. I'd sent them at  
17 least two.

18 Q. What other communications did you send them?

19 A. I can't remember, but it was on one of those  
20 subjects, you know, on drainage or the City of  
21 Toledo coming down this line, and, you know, what  
22 we -- how we could resolve this thing, that kind  
23 of thing.

24 Q. Were those e-mails or what were they?

25 A. I believe the letters were letters that were

1 faxed, mailed, both.

2 Q. Do you still have copies of those?

3 A. I'm pretty sure I do.

4 MR. WAGONER: Marv, could you  
5 produce a copy of those letters?

6 MR. ROBON: He is a consultant  
7 expert. If he gives them to me, I'll produce  
8 them. I've asked him for other things, and I  
9 haven't gotten them.

10 MR. TASSE: So they're friendly.

11 THE WITNESS: I'll get them, whoever  
12 wants them.

13 MR. ROBON: Just being candid.

14 Q. Mr. McCarthy, you talked about a lot of  
15 documents. Do you have an Old Granite file where  
16 all this information is contained?

17 A. Yes.

18 Q. How thick is that file, roughly?

19 A. Four inches. Well, yeah, four, eight  
20 inches, depending on whether you count drawings  
21 and stuff.

22 Q. What is contained generally in that file?

23 A. Generally in there is we got photos and  
24 these letters or addresses. We wrote letters to  
25 -- I wrote letters to the City and different

1 people, the County back in 2006 trying to get  
2 them to agree to give us free dirt and different  
3 things that we thought we could -- correspondence  
4 like that.

5 Q. And that's what, at your home office or  
6 something?

7 A. My home is my office.

8 Q. You could easily make a copy of that file,  
9 correct?

10 A. Yeah. It would be a lot of paperwork in  
11 there.

12 Q. But you know where it is? You know how to  
13 access it, correct?

14 A. Yes.

15 Q. So you said you have two communications,  
16 written communications with CSX Transportation?

17 A. Right, at least.

18 Q. Is it two or more?

19 A. I don't know. I say it's at least two.

20 Q. You know of two?

21 A. Right.

22 Q. To whom were those communications?

23 A. Well, I said one went to Dan Murphy. The  
24 other one went to this other guy down there that  
25 I do have his name. I can get that for you.

1 Q. Would that be in your file probably?

2 A. Yes.

3 Q. Both individuals in Jacksonville, correct?

4 A. Yes.

5 Q. No written communications that you can  
6 remember with Gene Wheeler?

7 A. No, we didn't have any written  
8 communications.

9 Q. And the subject of the written  
10 communications you had, what was the subject of  
11 those communications?

12 A. Well, I think -- we already said that.  
13 Access to get into the property was the main one,  
14 and I believe the other one was something about,  
15 you know, railroad drainage, whatever, you know,  
16 asking for information on that, if they had any  
17 information on this, or the history of it or all  
18 that kind of stuff. One was more of a background  
19 thing and the specific one was for, you know,  
20 that access.

21 Q. And the access was the hundred dump trucks,  
22 correct?

23 MR. ROBON: Asked and answered four  
24 times already.

25 Q. You have to answer out loud.

1 A. Yes.

2 Q. You met Gene Wheeler out at the development  
3 one time; is that correct?

4 A. Yes.

5 Q. What was the reason for that?

6 A. I had a couple of reasons. We talked about,  
7 you know, the property line. I was showing him  
8 how the contractor was over the line on our  
9 property. We looked at the wall, this wall, and,  
10 you know, we talked about how they could, you  
11 know, how they could have got off that far into  
12 our property.

13 Q. How who would have got off that far?

14 A. You know, the contractor for the City, you  
15 know. I was really asking them, you know, "Did  
16 you know they were doing all this stuff and that  
17 this is -- they came onto our property and all  
18 that?"

19 Q. What did he say?

20 A. He said, well, he said, "Well, we made kind  
21 of a deal, if the City gets down all those trees,  
22 we give them this ditch he could fill with dirt  
23 over on the center ditch.

24 Q. What trees are you talking about?

25 A. The trees that were along the property line

1 and the trees that were on our property line, so  
2 they're on the Cambridge property.

3 And he is going like, "Well, you know,  
4 so they went a little bit over on your" -- I  
5 said, "But why did they have to take the trees  
6 down anyways? All you had to do was put this  
7 six-foot diameter pipe down the center. What the  
8 heck is going on here."

9 He says, "You know, hey, we want all  
10 those trees -- CSX wants all those trees out of  
11 there. We made a deal with Ric-Man that, you  
12 know, what the heck, while you are there with  
13 this big equipment, get them all down. Get them  
14 all out of here." He didn't realize they were  
15 going to go over on the Cambridge property.

16 Q. When you talked to Mr. Wheeler, he indicated  
17 to you that he had no knowledge that Ric-Man  
18 would go off CSX property, if they actually did?

19 MR. ROBON: If you know.

20 MR. TASSE: I'll object. Object to  
21 the form.

22 MR. BAHRET: I object too because I  
23 object to the implication that anybody went off  
24 the railroad property.

25 Q. Yeah, if they did at all.

1 MR. TASSE: I object if Ric-Man did  
2 the clearing. Vermillion did.

3 MR. WAGONER: That's fair.

4 MR. TASSE: Vermillion did the  
5 clearing.

6 MR. FAGNILLI: Then I object.

7 A. We talked about those kind of things. I  
8 believe I asked about the drainage. He said, "I  
9 don't know anything about drainage. I take care  
10 of 150 miles or something of this stuff," these  
11 old things like that.

12 But that is what we were talking about  
13 was right after the clearing and the property  
14 line. You know, he made it sound like as if CSX  
15 was -- you know, not only that, he himself talked  
16 to Ric-Man's superintendent or someone in Ric-Man  
17 to make this arrangement that, "Yeah, we are  
18 going to get all of these trees down."

19 Q. How do you know that?

20 A. He told me that.

21 Q. What did he say specifically?

22 A. Well, now, this was back at 2006.

23 Q. What did he say?

24 A. April, March.

25 Q. Who did you meet with?

1 A. The same, probably March or April of 2006.

2 And, you know, he is like, "Hey, you know, we can  
3 take all these trees down," and, you know, he was  
4 going on like that.

5 Q. Is there anything wrong with CSX taking  
6 trees down on their own property?

7 MR. ROBON: Objection, calls for a  
8 legal conclusion.

9 Q. You can answer.

10 MR. ROBON: Are you referring to  
11 wetland trees or regular trees?

12 MR. BAHRET: There are no wetland  
13 trees on their property.

14 Q. You can answer.

15 A. Well, my understanding is that, you know, if  
16 they are wetland trees, you know, they shouldn't  
17 be taken down. You shouldn't be taking any more  
18 than you need to put your pipeline in.

19 Q. What if they're not wetland trees?

20 A. That's the only regulatory that you, other  
21 than endangered species, that's the only thing  
22 you have to worry about.

23 Q. So if they're not wetland trees, there's is  
24 nothing wrong with CSX taking trees down on their  
25 own property, correct?



1 A. There was one --

2 Q. That's either a yes or no question. Is that  
3 correct or incorrect?

4 MR. ROBON: I'll answer that because  
5 there is certain trees you can't take down with  
6 --

7 A. It's incorrect.

8 Q. Why?

9 A. To my way of seeing clearing, and we have  
10 done miles of clearing along property lines, the  
11 trees -- first you got to have a definition of  
12 what are the trees. The stump trees are what  
13 you're probably talking about.

14 But when you're going along a property  
15 line, if somebody else's trees are growing into  
16 your trees, at least in common construction that  
17 we did, you can't be taking out their trees that  
18 have grown into your trees.

19 You can't be just knocking them down,  
20 taking them out. You have to do it by hand. You  
21 can't just go, depending on how you're doing it,  
22 taking out somebody else trees that have grown  
23 into yours.

24 You have to be a good neighbor and try  
25 to preserve as best you can whatever trees he has

1           because those -- like your trees will grow out  
2           there, his trees grow in here.

3           Q.   Let's go back to my question.

4                       MR. BAHRET:  Move to strike.  It  
5           wasn't responsive.

6                       MR. FAGNILLI:  I join in that  
7           motion.

8           Q.  Is it your testimony that there is nothing  
9           wrong with CSX Transportation taking down trees  
10          on their property, yes or no?

11                      MR. ROBON:  Objection.

12          A.  They can't always take the trees down on  
13          their property.

14          Q.  When were the trees taken down on CSX  
15          property?

16          A.  What were they?

17          Q.  When were they?

18          A.  When they did the clearing.

19          Q.  When was that?

20                      MR. ROBON:  Objection.  My god, it's  
21          been answered -- don't answer it.  You've  
22          answered it four times.  I'm not letting you  
23          answer it again.

24                      Go to the next question.  If you  
25          want to call the judge, go ahead.

1 Q. So you don't remember when -- when did you  
2 -- you testified earlier you went down backwards  
3 down the manhole, correct? You have to answer  
4 out loud.

5 A. Yes.

6 MR. BAHRET: He said upside down, not  
7 backwards.

8 Q. Upside down, right. Correct?

9 A. Yes.

10 Q. You snapped some photographs, correct?

11 A. Yes.

12 Q. How many photographs did you take, if you  
13 remember?

14 A. A few.

15 Q. Six?

16 A. A few, I don't know.

17 Q. You were with your son when you did that,  
18 correct?

19 A. I think so.

20 MR. ROBON: Objection, asked and  
21 answered.

22 Q. When was that done?

23 A. Right after the clearing.

24 Q. Whose permission at CSX did you ask to come  
25 on the property and snap those photographs?

1 A. The only -- I had no -- back in that time I  
2 didn't have any permission.

3 Q. So you did not ask for permission, correct?

4 A. That's right.

5 Q. At that time.

6 A. At that time.

7 Q. So is it fair to say that at the time you  
8 took those photographs, you're trespassing on CSX  
9 property?

10 MR. ROBON: Objection, don't answer.

11 MR. FAGNILLI: What's the basis for  
12 not answering?

13 MR. ROBON: He is invoking the Fifth  
14 Amendment.

15 MR. FAGNILLI: I didn't realize he  
16 was doing that.

17 MR. BAHRET: He's got to do it. You  
18 can't afford him.

19 (Off the record.)

20 Q. (By Mr. Wagoner) Mr. McCarthy, you sent  
21 several e-mails regarding the Old Granite project  
22 to Christy Soncrant among others?

23 A. Yes.

24 Q. I'm going to go over some of those emails  
25 with you quickly.

1 A. Okay.

2 Q. Mark this as McCarthy Q.

3 (Defendant's Exhibit Q marked  
4 for identification.)

5 Q. This is a June 4th, 2006, e-mail that you  
6 had sent to Ms. Soncrant, correct?

7 A. Yes.

8 Q. You have to look down. There's the FYI up  
9 top. It looks like your e-mail is --

10 A. I'm looking at the top, something sent.

11 Q. I want to refer you -- I'm not going to go  
12 through this paragraph by paragraph. I want to  
13 refer you to paragraph three where you said, "CSX  
14 indicated to me that they were in direct contact  
15 with Ric-Man about doing some extra clearing  
16 while Ric-Man's sub was doing your water main  
17 clearing." Do you see that?

18 A. Yes.

19 Q. Who at CSX communicated that to you?

20 A. The only one that I was talking about on  
21 that subject was this Gene Wheeler. Is that what  
22 you mean?

23 Q. Yeah.

24 A. The CSX guy, yes.

25 Q. That's the only individual, correct, at CSX?

1 A. Yes, the only one I really talked any detail  
2 like this was Gene Wheeler.

3 Q. And you exchanged no written communications  
4 with Mr. Wheeler?

5 A. Not that I recall.

6 Q. You have none in your file?

7 A. No.

8 Q. Then the next sentence says, "I can  
9 understand that CSX might have wanted your  
10 contractor to clear the heavy growth along the  
11 right-of-way line that they had neglected." Do  
12 you see that?

13 A. Same paragraph?

14 Q. Correct, the next sentence.

15 A. If you would have seen it -- you're on  
16 the third paragraph?

17 Q. I'm asking you to read the second sentence  
18 in that third paragraph.

19 A. I'm on the fourth paragraph. "CSX indicated  
20 to me that they were in direct contact with  
21 Ric-Man about doing some extra clearing while  
22 Ric-Man sub was doing your water main clearing.  
23 I can understand that CSX might have wanted your  
24 contractor to clear the heavy growth along the  
25 right-of-way lines that they had neglected, but

1 stayed back from with heavy clearing of equipment  
2 now that homes were built."

3 Q. I just want you to read that one because I  
4 don't want to get --

5 A. Okay.

6 Q. How do you know that CSX neglected this  
7 area?

8 A. As far as the trees? That they had grown up  
9 all these years. They had never done the cutting  
10 of the trees.

11 Q. Had you been in this area before the trees  
12 were cut down?

13 A. Yeah, generally in this area. Now, I  
14 wasn't --

15 MR. ROBON: Yes or no. You answered  
16 the question.

17 A. I have seen this area, yes.

18 Q. My question is how do you know it was  
19 neglected because by the time you were there, the  
20 trees were cut down?

21 A. The stumps indicated and whatever was laying  
22 around that there was some big trees that were  
23 cut, and they didn't grow up, you know, in ten  
24 years. These were major trees, and that's what I  
25 was talking about here. If it had been

1 neglected, that's what I meant.

2 Q. So is it your testimony that since these  
3 trees were neglected, they should have been cut  
4 down?

5 A. No. Why is he cutting them down now under  
6 the guise of this water main contract, you know.

7 Q. I don't understand.

8 A. Here's this big piece of equipment from, you  
9 know, Vermillion, and now you're letting CSX take  
10 down all these trees along the edge, you know,  
11 that they've neglected for years. They want to  
12 take advantage of them having this big piece of  
13 equipment in there and getting them down.

14 Q. What is wrong with that? What's wrong with  
15 CSX taking trees down along their property?

16 A. They shouldn't be taking it down on the  
17 guise of this water main, as I'm telling her.  
18 "You didn't need to take these down for the water  
19 main. You let CSX do this, you know."

20 Q. Did you write these e-mails yourself?

21 A. Yes.

22 Q. Why did you CC Mr. Robon on these e-mails?

23 A. Because we are already into this thing.  
24 What time is this? This is June. We are meeting  
25 with the City, we are trying to get this settled.



1 We had meetings with the City trying to get them  
2 to build a mound, get some money from them to  
3 replace these trees and all this stuff. So we  
4 were already -- Marv was already involved.

5 Q. Before you sent these e-mails out, did you  
6 send them to Marv to review them?

7 A. No.

8 Q. Then in the last paragraph --

9 MR. ROBON: If he did, they wouldn't  
10 have gone.

11 Q. The second-to-last paragraph on that page  
12 that begins with lastly?

13 A. Yes.

14 Q. There is a sentence in the middle of that  
15 paragraph. It says, "CSX might donate the real  
16 estate rights for their role in the excess  
17 clearing"?

18 A. Uh-huh.

19 Q. Do you see that?

20 A. Right.

21 Q. Yes?

22 A. Yes, I see it.

23 Q. What do you mean, that CSX should donate  
24 that entire right-of-way?

25 A. No. What we were talking about, at this

1 time we were about ready to build a mound. And  
2 we really wanted to build the mound up on the  
3 railroad because it would save us a lot of  
4 trouble, and at least we wanted to be able to  
5 build up along the edge, raise the edge of it  
6 five or ten feet so we wouldn't be so far back  
7 into the backyards.

8 And that's what I think I'm referring  
9 to there that -- as far as we were talking about  
10 this mound that we wanted time to build up. That  
11 was all the rage now; we had to have this mound  
12 built, and we were in the process of maybe  
13 building it.

14 Q. Before this, before Old Granite, before this  
15 development with your time with the Army Corps of  
16 Engineers, had you dealt with CSX on a regular  
17 basis?

18 A. Every year or two.

19 Q. Are you familiar with working with them?

20 A. Yes.

21 Q. You knew who to talk to?

22 A. Those people were not around anymore. I  
23 didn't know any -- I didn't really know anybody  
24 anymore.

25 Q. Have you ever done any projects out at the

1 docks, the CSX docks?

2 A. Yes, that is where I saw them because the  
3 Corps really is involved in all the shipping  
4 stuff and that, the dredging and that.

5 (Defendant's Exhibit R marked  
6 for identification.)

7 Q. Mr. McCarthy, I'm handing you Exhibit R.  
8 This is an e-mail that looks like you sent on  
9 August 19th to Christy Soncrant? Do you see  
10 that? You have to go down.

11 A. Yep.

12 Q. I'm referring you to the fifth paragraph.

13 A. The big one?

14 Q. Correct. It says, "See my other e-mail."

15 A. Yeah.

16 Q. That first sentence ends that, "The  
17 probable," and take as much time as you want to  
18 read this over. "The probable impact of your  
19 project on the impact of CSX's long-term neglect  
20 of drainage to the general area and Cambridge."

21 A. Uh-huh.

22 Q. Do you see that?

23 A. Yes.

24 Q. What did you mean by that?

25 A. Like I was talking earlier, I had already

1       talked to the neighbor. He said that, you know,  
2       Gillette, and they said, you know, "They haven't  
3       been a good neighbor anyway. They haven't taken  
4       care of this cross drain."

5               And that was really the -- I don't  
6       know if it was the only thing, but that was  
7       probably the thing that I was referring to there,  
8       that they haven't been a good neighbor as far as  
9       keeping the drainage working.

10      Q. Again, the only person that told you that  
11      was, I don't know if it's Mr. Gillette, but  
12      Gillette's son-in-law?

13      A. Yeah. He told me that and the county  
14      drainage engineer, he also, the Glenn Agner that  
15      we deposed, he confirmed it was there. He  
16      also --

17      Q. He confirmed that what was there?

18      A. That the pipe was there, and that CSX, they  
19      probably did neglect it.

20      Q. What is that based on?

21      A. His experience with CSX.

22      Q. But not on this specific drain, correct?

23      A. No, he was not --

24      Q. He had no knowledge of this specific drain,  
25      correct?

1 A. That's right.

2 Q. And neither did you?

3 A. Before the clearing?

4 Q. Correct.

5 A. Yes.

6 Q. Then you talk about, "CSX is apparently  
7 directing your contractor to change the center  
8 drainage ditch and to abandon the 24-inch  
9 crossover storm drain that Cambridge relied on to  
10 get flood water past their property to Bates  
11 Road." Do you see that?

12 A. Yeah, I heard it.

13 Q. Take your time to read it, too, if you need  
14 to.

15 A. That same paragraph?

16 Q. Correct. What's that based on, CSX  
17 apparently directing the City's contractor?  
18 Where did you get that information?

19 A. Just the only direct thing I knew was that  
20 from Gene Wheeler, you know. I didn't ask him  
21 for it. He just told me that was the way it  
22 went.

23 Q. So Gene Wheeler told you that CSX had  
24 directed the City to bypass that drain?

25 A. No, they had made arrangements with Ric-Man.

1 I can't remember whether he said he did it or  
2 what, but that they had made arrangements with  
3 Ric-Man to trade trees for disposal areas,  
4 including the center ditch.

5 Q. "We had already had minor problems with CSX  
6 flooding Cambridge's backyards." Do you see that  
7 sentence in there? What prior flooding problems  
8 had you had?

9 A. I think what I was talking about is because  
10 they haven't -- this guy was telling me back in  
11 '85 they had had problems before with CSX not  
12 keeping that drain working a hundred percent.

13 Q. So 21 years before there was -- he told you  
14 of one example 21 years ago or 21 years prior to  
15 this e-mail?

16 A. Well, he told me more than that.

17 Q. What else did he tell you?

18 A. He said that he had to maintain the darn  
19 thing because CSX won't come out. They don't  
20 even treat Toledo Terminal as if it's theirs.

21 Q. What do you mean? What do you mean they  
22 don't treat Toledo Terminal like it's theirs?

23 A. Like as if they don't even know it. There's  
24 not anybody around anymore that even knows it's  
25 there. They don't even take him seriously. But

1       that was the flavor of his thing was that he  
2       himself, every time it rained real hard, all the  
3       water from Hospice and that all came down, and  
4       they relied on that thing. And he had to go out  
5       there, make sure the manhole wasn't plugged up.

6       Q. So he would go out there himself on CSX  
7       property and unplug the manhole?

8       A. He said he did that himself, and the time in  
9       '85, they had a big pile of dirt on the other  
10      side outlet. So he's -- and he couldn't do  
11      anything about that because they were doing some  
12      construction or something. So he says that was  
13      the other -- old railroad lines and that, he  
14      says, they neglected. That's what I was trying  
15      to say here.

16     Q. If you go down further in that chain of  
17     e-mail, if you go to page two, this is your  
18     e-mail on August 3, 2006, to Christy. The second  
19     paragraph where you talk about your familiarity  
20     with these lopsided agreements between railroads  
21     and oil companies?

22     A. Yes.

23     Q. Do you see that?

24     A. Yes.

25     Q. What are you talking about there?

1 A. We're talking about this, the agreement  
2 between --

3 MR. ROBON: Objection, the document  
4 speaks for itself. But you can answer.

5 A. That document that was between, this  
6 agreement between the City and CSX to allow the  
7 City of Toledo to put the water main down the  
8 railroad line.

9 Q. What other agreements are you aware of  
10 involving railroads or oil companies? You said  
11 you're quite familiar?

12 A. Well, we in the Corps dealt quite a bit with  
13 the railroad, and even though I wasn't an  
14 attorney dealing with, you know, the agreements  
15 and such, that I suppose that's what I was  
16 referring to is some of our past experience with  
17 the railroad that these agreements are all on  
18 their side.

19 And even the City of Toledo told us,  
20 you know, we had meetings there last summer that  
21 they --

22 Q. What was the silver lining? In the next  
23 sentence you say, "But a cup of silver linings  
24 for Cambridge and the City can emerge." What did  
25 you mean by that?



1 A. Second paragraph? You're still on the  
2 second paragraph?

3 Q. Yes. And then it say the millions of  
4 liability coverage the City paid for only CSX  
5 liability can lead to a simplified and expedited  
6 solution." Do you see that?

7 A. Yes. I think I'm -- or maybe there is some  
8 assurity that we can get the mound paid for.

9 Q. So is that what you meant? You were looking  
10 to get the mound paid for?

11 A. That is what we were after. At this time  
12 last year we were trying to go -- we met with the  
13 City to try to get money to build a mound and put  
14 trees on top of it. They even agreed to do some  
15 of it, and we thought maybe -- I thought maybe  
16 one of the -- or charity could help pay for some  
17 of this stuff.

18 Q. Had you had some bad experiences with CSX in  
19 the past?

20 MR. ROBON: Objection, you can  
21 answer.

22 A. Bad? What do you mean bad?

23 Q. Did you dislike CSX?

24 MR. ROBON: Objection. That calls  
25 for a personal opinion.

1 A. No. We dealt with all the railroads and,  
2 you know.

3 Q. Why did you refer to CSX as distant and  
4 aloof?

5 MR. ROBON: Because they are.

6 A. They are. They're in Jacksonville. There's  
7 50 million departments. We have to go through  
8 hell to get any answers from them.

9 Q. Do you know how many people they employ in  
10 the Toledo area?

11 A. Who?

12 Q. CSX.

13 MR. ROBON: Objection, irrelevant.

14 A. No, I don't.

15 Q. Who is the guy you worked with at the Corps  
16 of Engineers who -- regarding the flooding or the  
17 drainage issue? Scott, Bob Scott? You talked  
18 about him earlier.

19 A. There was a -- Gary Buck is our wetlands  
20 guy.

21 Q. Gary Buck?

22 A. Yes, he was retired wetlands guy from the  
23 Corps of Engineers.

24 Q. Have you exchanged a lot of e-mails between  
25 you and Mr. Buck regarding Old Granite?

1 A. Not really.

2 Q. You have?

3 A. We have got some.

4 MR. FAGNILLI: Is he going to be an  
5 expert for you in this case, Gary Buck?

6 MR. ROBON: Possibly. I haven't  
7 talked to him yet. Possibly. When he was with  
8 the Corps, he was impossible to get ahold of, and  
9 he is still impossible.

10 MR. FAGNILLI: It's kind of ironic  
11 to have a guy from the Corps talking about  
12 arrogant and aloof.

13 THE WITNESS: Not our department.

14 MR. FAGNILLI: When you try to get a  
15 permit or something.

16 Q. (By Mr. Wagoner) What do you think CSX did  
17 wrong here?

18 A. Well, I think, you know, they shouldn't have  
19 encouraged, gone along with this deal to take  
20 down all those trees. That was the number one  
21 thing.

22 Secondly, they should have gone and  
23 known about, and when they let the City go on  
24 this property to explain that they did, maybe it  
25 was a hundred years ago, but they did have an

1 active culvert. Maybe it wasn't in good shape,  
2 but they should have told or known that or when  
3 the City, I believe they asked, should have been  
4 able to explain that. But those are the two main  
5 things, the drainage and the excess trees being  
6 cut down on the edges.

7 Q. What should they have done?

8 MR. ROBON: Objection. You can  
9 answer.

10 A. They should have dug it a little deeper and  
11 found out that there was a drain there and it's  
12 needed. And rather than just let the City  
13 stumble around and not knowing what the hell it  
14 was or whatever --

15 Q. But you, yourself, have never done any  
16 drainage studies to indicate that that drain is  
17 needed, correct?

18 A. We have done some preliminary work, yeah, I  
19 have.

20 Q. Do you have a copy of that study?

21 A. Yes.

22 Q. Is it in your folder?

23 A. Yes, it is.

24 Q. If it's determined that all these trees are  
25 on CSX's property, is it your testimony that with

1       respect to the trimming of the trees or the  
2       removal of the trees that CSX did nothing wrong?

3               MR. ROBON:  Objection, calls for a  
4       legal conclusion.

5       A.  I think we've already established that, you  
6       know.

7       Q.  When is the last time you had contact with  
8       anyone from CSX?

9       A.  2006.

10      Q.  When Mr. Wheeler came out?

11      A.  No.  I was still talking to Dan Murphy I  
12      think after that.

13      Q.  You have had no direct communications after  
14      the filing of this lawsuit?

15      A.  Right.

16               MR. WAGONER:  That's it.  No more  
17      questions.

18               MR. ROBON:  We reserve signature.

19               MR. BAHRET:  We are not done.

20               MR. ROBON:  Show an objection to  
21      there was no direct exam.  These are all cross,  
22      so the second bite of the apple I don't think  
23      they're entitled to.

24               MR. BAHRET:  Well, we are doing it  
25      anyway.

1 MR. ROBON: I'm sure you'll be  
2 concise.

3 MR. BAHRET: I'll try.

4 - - -

5

6 RECROSS EXAMINATION

7 BY MR. BAHRET:

8 Q. Mr. McCarthy, when you were talking with  
9 Jeff Tasse, you were talking about a wall or a --  
10 a wall made of railroad ties. Do you remember  
11 that discussion?

12 A. Yes.

13 Q. My understanding is this wall was five or  
14 six feet tall?

15 A. Yeah, about five feet tall.

16 Q. And it was, looking at the map of the  
17 development, it would be along Lots 14, 15 and  
18 that portion of 16 that abuts the railroad  
19 property?

20 A. Yes.

21 Q. And you can't see the entirety of that wall  
22 now because dirt has been put there since this  
23 project?

24 A. You can still see it down in that trench, if  
25 you look down in there.

1 Q. What I meant, and I'm not sure you  
2 understood, it doesn't look the same now. It's  
3 not like there is a five-foot wall that you can  
4 walk up to and see it and touch it? You can see  
5 a portion of it?

6 A. I think we --

7 MR. ROBON: Yes or no is how you  
8 answer that question.

9 A. That it's the same now as it was then is  
10 what you're asking, right?

11 Q. I'm saying based on testimony and what I've  
12 seen out there, I'm assuming it is not the same  
13 now than it was then?

14 A. That's true.

15 Q. So on the day that this land clearing took  
16 place, the land clearing device would have been  
17 five feet higher than the bottom of the back of  
18 these lots?

19 A. Yes.

20 Q. At least in that section of the Cambridge  
21 property, it would be virtually improbable to  
22 clear the land on the other side of the wall; is  
23 that right?

24 A. No, they had major equipment. They reached  
25 right in and pulled it out.

1 Q. They reached over this five-foot wall?

2 A. Oh, yeah, and they were sitting right up on  
3 top.

4 Q. You saw that?

5 A. No, I didn't see it, but I knew the trees  
6 were there. It was all gone by the time I got  
7 there.

8 Q. They pulled trees out, stump and all?

9 A. Yes, anything that came out. You know,  
10 smaller stuff was pulled out, and the top  
11 railroad ties were knocked off.

12 Q. If land was cleared, if a sizeable tree was  
13 cut, it would have been cut at least five feet  
14 higher than ground level then, correct?

15 A. Oh, no, no. This type of a -- this  
16 Hydro-Axe cut them right in the dirt, okay?  
17 That's the beauty of it. It actually spins the  
18 dirt and throws everything.

19 Q. It will cut five feet lower than where the  
20 device is?

21 A. It will cut right down to -- you know, you  
22 could. You know, it's on a back front-end  
23 loader, and you could go and set the thing down.  
24 But in this case, I don't think we are really --  
25 he just cut the top.



1 Q. Let me ask you about the other side of the  
2 development, the side closer to Hospice, which I  
3 think is Lots 9, 10, 11, 12, 13, so forth.

4 A. Right.

5 Q. Would you agree with me on that side of the  
6 development that the boundary stakes that  
7 Peterman staked there and that the City staked  
8 there are on the opposite side of the ditch as  
9 the railroad right-of-way?

10 A. They're down in the ditch, down in the  
11 bottom of the ditch.

12 Q. On the side of the property where Lot 9 is?

13 A. Yes. There was a ditch all along there,  
14 okay? There still is.

15 Q. Yeah.

16 A. And the property line is right down at the  
17 bottom of that ditch, okay?

18 Q. How sure of that are you because I've got  
19 photographs.

20 A. I've got photographs too before, and what  
21 you have to remember --

22 Q. Has the ditch changed?

23 A. Yes. They filled the ditch in, too.

24 Q. There is not a ditch there now?

25 A. They made it so it's much more vertical.

1       They filled the top of that ditch in, and the  
2       property line -- you may see that the stakes may  
3       be up near the top of that embankment now because  
4       they filled that in.

5       Q.   The stakes that I've got pictures of, and if  
6       we go out there you can see, are not in a ditch.  
7       They're on the Cambridge side of the ditch.

8       A.   And are you talking about property line?  
9       What, you think they're property line stakes?

10      Q.   Yeah, but they're Peterman stakes.

11      A.   But they're right down at the bottom of that  
12      ditch.

13      Q.   All right. Well, then we will just agree to  
14      disagree and let the jury see the photos. But  
15      your testimony is that the ditch is not in the  
16      same place now as it was then?

17      A.   The side of the ditch is not the same, okay?

18      Q.   One side of it?

19      A.   One side. The bottom of it is the same.

20      Q.   So if we can find the bottom of the ditch,  
21      we know where the ditch was even on the day this  
22      here was done?

23      A.   On those lots up at the end, yes.

24      Q.   Now, one other topic I wanted to address,  
25      and that is my understanding of your testimony is

1       that the -- although you said that in your view  
2       Cambridge relied upon this ditch and the manhole  
3       with the crossover tile?

4       A.   Right.

5       Q.   That it did not support drainage from Lots  
6       15 or 16; is that correct?

7       A.   It was used for the whole development, the  
8       whole development.

9       Q.   How would drainage from Lot 15 or 16 get to  
10      that, get in the manhole?

11      A.   Before it went right down that feeder pipe,  
12      a one-inch diameter pipe that went to the manhole  
13      underneath that -- right behind that wall. Right  
14      behind the wall there is a 12-inch diameter pipe  
15      that runs that whole distance past 15, 16.

16      Q.   But there is no opening to gain access to  
17      get water in that pipe?

18      A.   Yes, there is; it's wide open. We got  
19      pictures of it.

20      Q.   Where is the opening? My understanding is  
21      that this pipe that you're talking about, it's a  
22      total circumference? It's a pipe?

23      A.   Right, it's a 12-inch diameter clay pipe.

24      Q.   It begins somewhere down near Lot?

25      A.   14 -- 13, 13.

1 Q. 13.

2 A. 13.

3 Q. And then it is solid and underground?

4 A. Underground behind the wall.

5 Q. And goes to that manhole?

6 A. Manhole, right.

7 Q. And then another pipe goes into that manhole  
8 where the only opening to that pipe is you said  
9 250 feet away on this other guy's property?

10 A. Right, both of them come to the manhole.

11 Q. So there is no access to that pipe or the  
12 manhole from Lots 15 -- actually, 14, 15 or 16?

13 A. That's true; it's underground.

14 Q. So it can't possibly be supporting drainage  
15 from Lots 14, 15 and 16?

16 A. Not so.

17 Q. How could it support drainage from those  
18 lots?

19 A. When our -- when we are overwhelmed with  
20 flood waters, that water is going to go down, you  
21 know, go down to both ends of that. You know, we  
22 are talking about two, three, four feet, six feet  
23 of water, which this guy saw at Cambridge, four  
24 feet up into my kid's house, which is what it  
25 would be, that water is going to go back in both

1 ends of that pipe or would have.

2 Q. Have they had water like that since this  
3 land clearing was done?

4 A. No, of course not.

5 Q. All right. You're talking about a small  
6 amount of ponding at the back corner of Lot 16,  
7 correct?

8 A. I'm not. I'm talking about that you can't  
9 even develop this place. You know, if the county  
10 was doing their job, we wouldn't even have a  
11 building permit.

12 Q. You're talking about Lot 16, correct?

13 A. 16, 15, 14, all the way up through there you  
14 could have major flooding. You're going to drain  
15 all of Hospice, W.W. Knight down through there  
16 and it has no place to go now.

17 Q. I'm not talking to you about what could  
18 happen in theory. I'm asking what you have seen,  
19 and you described it as ponding?

20 A. That's true.

21 Q. Where did you see the ponding?

22 A. Only at Lot 15, 16 and that.

23 Q. All right. And this ponding is not  
24 sufficient, this ponding that you've seen cannot  
25 get off that property by use of this underground

1 pipe, correct?

2 A. That little bit there, it can't get around  
3 to the ends of it.

4 Q. All right.

5 A. It's not backed up enough.

6 Q. So whatever ponding you've seen has nothing  
7 to do with cutting the crossover pipe?

8 A. That's not quite so.

9 Q. That's got to be so. You tell me how it's  
10 not so.

11 A. Because what we talked about earlier.

12 Q. I don't remember what we talked about  
13 earlier.

14 A. Water is coming back. We've got pictures of  
15 it flowing -- a pipe that we put -- we put a  
16 drain into that -- we put a pipe into that  
17 12-inch --

18 Q. The pipe that is underground and goes behind  
19 Cambridge, whether you call it the end or the  
20 beginning at Lot 13 is in a ditch?

21 MR. ROBON: Can we clarify one  
22 thing. It's not a pipe; it's a field tile.

23 THE WITNESS: It's a pipe, Marv.  
24 Nice try.

25 MR. BAHRET: But he said it's a

1 pipe.

2 THE WITNESS: Marv, but it's solid.

3 It's a solid pipe.

4 MR. BAHRET: Go back to sleep, Marv.

5 A. It's a solid pipe.

6 Q. I understood that. I think Marv missed it.

7 MR. ROBON: I didn't understand  
8 it's a solid pipe.

9 Q. That pipe, whether you call it the beginning  
10 or the end behind Lot 13, it's in a ditch,  
11 correct?

12 A. It's in the bank. From there it's buried.

13 Q. Well, it comes out somewhere?

14 A. I think it comes -- it goes into the  
15 manhole.

16 Q. The other end --

17 A. Right.

18 Q. That's in a ditch, correct?

19 A. The other end does the same thing. The  
20 other end runs up a couple hundred feet the other  
21 way. That's the low point right there where that  
22 manhole is, and that drain and stuff --

23 Q. Sir, I really find it hard to believe that  
24 you don't understand this question. There are  
25 two ends of this pipe.

1 A. Right.

2 Q. One is in the manhole, right? Am I right?

3 A. Yeah, the pipe you're talking about.

4 Q. I want to talk about the other end of that  
5 pipe?

6 A. Yes, on Lot 13.

7 Q. And it ends or begins, however you want to  
8 look at it, behind Lot 13?

9 A. Right.

10 Q. It's not on Lot 13; it's behind Lot 13,  
11 correct?

12 A. Right.

13 Q. And that spot where it begins or ends is in  
14 a ditch; is that correct?

15 A. That's down at the bottom of a ditch. That  
16 ditch goes right into it.

17 Q. And so if water is coming backwards, as you  
18 put it, because of the crossover drain, that  
19 water would be in the ditch?

20 A. It would back up to that ditch.

21 Q. And the only way water is going to get on  
22 Cambridge property from what you allege is water  
23 coming backwards is if the ditch completely  
24 floods? Am I right? That seems real simple.

25 A. Yeah. There is a little ditch. Then the



1 water doesn't go down the pipe. The water moves  
2 out to the ditch in front of this wall.

3 Q. Okay.

4 A. And it comes down and feeds that pond in  
5 front of and behind Lot 15, 16. It backs up and  
6 goes around and goes around the front. Same with  
7 the other end; it goes back around that way.

8 Q. How does it get out of the ditch to come  
9 around and feed the pond?

10 A. It's an open gravity pipe. It just, you  
11 know, comes right back around. It's almost a  
12 flat property.

13 Q. The ditch where this pipe terminates?

14 A. Yes.

15 Q. It's a ditch from that spot all the way down  
16 toward Hospice, isn't it?

17 A. Yeah, but it's running towards us. You  
18 know, it's running towards Lot 15. All that is  
19 downhill.

20 Q. Can we agree water runs downhill?

21 A. Yes, we can.

22 Q. Can we agree water isn't going to go up on  
23 top of -- out of this ditch unless the ditch is  
24 full?

25 A. And it feeds, goes back around and down to

1 my kid's house. It backs up both ways, fills  
2 this thing.

3 Q. To back up, can we agree the ditch has to be  
4 full of water?

5 A. It was.

6 Q. And you say going around the other end, you  
7 believe it's doing the same thing on this  
8 other -- I forget the guy's name.

9 A. Gillette.

10 Q. The Gillette property, and it feeds back  
11 down to this little pond?

12 A. Right.

13 Q. The only way the water gets out of this area  
14 where the pond is now or ever would be absorption  
15 or just leaching into the soil, correct?

16 A. Or go out our Cambridge system. We have  
17 manholes, we have catch basins all along in the  
18 back there, too.

19 Q. Well, why wouldn't the water that you say is  
20 ponding at the back of 16 or 15 go out your catch  
21 basins that were bought and paid for by  
22 Cambridge?

23 A. It does, it does. But not -- it was  
24 designed -- that only was designed for our  
25 property, not for draining all of Hospice,

1           Gillette. All that water is coming down. Our  
2           system wasn't designed to take that.

3                     It can't take it out fast enough. It  
4           will take it out, but it takes some time. That's  
5           the only thing, those ponds are only -- it's only  
6           a temporary thing until our system catches up.

7           Q. Before the tree removal project or whatever  
8           you want to call it, had you ever walked on the  
9           back of Lot 16?

10          A. I'm sure I walked back there, but, like I  
11          said, I wasn't thinking anything like this was  
12          going to happen.

13          Q. Were you present shortly after a major  
14          rainfall?

15          A. No. If I was, I don't remember it.

16          Q. So whatever the extent of ponding was before  
17          this incident, you're just basically guessing?

18          A. Only thing I'm saying is we had Lori, my  
19          son's wife, claims that they never had ducks on  
20          this thing before.

21          Q. Never had what?

22          A. Ducks in the backyard before that it ponded  
23          this much. And the only other thing was that  
24          when the water is coming right out of the ground  
25          when these guys are pumping, we knew that this

1 thing was not -- this thing was needed, you know.

2 Q. You're going to hear testimony from City of  
3 Toledo workers, probably Ric-Man workers and  
4 maybe others that even when they were working  
5 there, they remember ponding in the area that's  
6 in question. Now, are you going to be able to  
7 say they're wrong?

8 A. No, we don't deny that there was some  
9 ponding. I mean, it's just that we say it got  
10 worse.

11 Q. Have you spoken with whoever owns Lot 16?

12 A. No, I've never spoken to him.

13 Q. Do you know who owns it? Is it the Berman  
14 lot or the Hoffman lot?

15 A. I think it's the Berman lot. I've seen that  
16 on the sign, but I've never had contact with him.

17 Q. You don't know what he would say about any  
18 ponding?

19 A. No.

20 Q. I assume you were asked by Mr. Robon to come  
21 here with various conclusions or opinions. On  
22 what subjects were you asked to render opinions?

23 MR. ROBON: Objection. Show that --

24 MR. BAHRET: I'm not asking what his  
25 opinions are, Marv. I'm asking on what subjects.

1 MR. ROBON: These are things that  
2 were not brought up during Mr. Bahret's original  
3 examination, and nor were they brought up by any  
4 other counsel. So they're a new matter. So just  
5 show an objection to it. You can answer.

6 Q. I'm assuming one of them is the effect of  
7 the drainage pipe, the crossover pipe?

8 A. The drainage, and particularly where does  
9 that put the hundred-year flood where the houses  
10 are going to be flooded out in the future when  
11 you really have a nine-inch rain.

12 We look at that, and the drainage and,  
13 you know, the trees. In the sense that we did a  
14 lot of clearing where I was from, is this proper,  
15 and particularly with the design of this thing or  
16 whatever.

17 Q. The design of what? What were you asked to  
18 render an opinion as far as the design?

19 A. Well, as far as looking at the drawings and  
20 the design of the thing, you know, whether this  
21 thing should have happened, whether somebody  
22 should have looked into whether we needed all  
23 these trees to be taken down to put this water  
24 main in. The drainage pipe, should they have  
25 spotted this thing in the design stage when the

1 consultant did it. Those are really the two  
2 things that I've been working on, so the trees  
3 and the drainage.

4 Q. As far as the trees, you're questioning  
5 whether they should have removed as many trees as  
6 they removed, whether they're on Cambridge  
7 property or not?

8 A. Yes.

9 Q. And so you believe, whether right or wrong,  
10 that a landowner doesn't have the right to do  
11 tree removal on their land, no matter what you  
12 think about it?

13 A. No, they have that right, but they got to go  
14 through the permit process, and, you know, you  
15 have to be careful around the edges. Those are  
16 kind of --

17 Q. And the permit process you're talking about  
18 is, I assume, this wetlands thing?

19 A. Yes.

20 Q. The topic that you're not an expert in and  
21 we have to talk to your associate?

22 A. Right.

23 Q. You would agree if there isn't a wetlands  
24 issue, there is no requirement for a permit from  
25 the Corps of Engineers?

1 A. If there is what? If there is no what?

2 Q. If it's not a wetlands issue, if it's not a  
3 wetlands area, you don't need to get a permit  
4 from the Corps of Engineers, correct?

5 A. I don't -- I think -- again I'm not the  
6 expert. You should be asking Gary. But I think  
7 because of the bridge, I think there is a special  
8 hoop the City had to go through.

9 Q. Over what bridge? You lost me.

10 A. There is a river crossing. It crosses the  
11 Maumee a mile down from Cambridge. Where the  
12 bridge goes across the river, there is an Army  
13 Corps of Engineers permit for that bridge.

14 And if you're doing any project that  
15 has any impact on that river crossing, you have  
16 to go and get a special permit for all of your  
17 work, the whole project, not just the bridge.  
18 That's just an extra review that I understand  
19 should have been done here. I don't know whether  
20 it was or not.

21 Q. Do you know if the City obtained any sort of  
22 permit to put a pipe under the river?

23 A. They did. They did make an application.

24 Q. So the process you're talking about --

25 A. Is in conjunction with that.

1 Q. And it was done?

2 A. I don't know if it was done, as far as you  
3 would have --

4 Q. If it wasn't done, whose fault is that, the  
5 Corps of Engineers or the City?

6 A. No, the City had -- the City, it was their  
7 water main. For their project you have to have  
8 all the wetland. Could be there are certain  
9 specific things in the regulatory process you  
10 have to submit, particularly any old wetland --

11 Q. I'm not -- I'm with you on wetlands. I  
12 think we agree that if there is wetlands and  
13 you're going to do something in the wetland  
14 that's destructive, you need a permit. The issue  
15 is --

16 A. This is the same.

17 Q. Pardon?

18 A. This is basically the same thing other than  
19 it's a few more hoops you have to jump through to  
20 make sure that those trees, the trees, especially  
21 on a railroad line, they support wildlife  
22 migration and that type. And the Corps wants to  
23 see all of that stuff before you go and get your  
24 permit to go underneath the river. It's a little  
25 more than what --



1 Q. What regulations are you citing?

2 A. I have no idea what the name of the law is.

3 Q. You don't have any idea what regulation  
4 you're talking about?

5 A. This has to do with navigable waters at the  
6 Maumee River. You got a major river crossing.  
7 In order for you to do any -- to get a permit  
8 associated with that, it's underneath that permit  
9 that the Corps has given CSX.

10 And if the City wants to use that  
11 right-of-way for that bridge, they have to get  
12 some -- they have to get not just a permit, a  
13 special -- a specially reviewed permit.

14 Q. Did they do it?

15 A. I don't know.

16 Q. Did you check?

17 A. Marv says that the -- that there's a  
18 document down somewhere, and we are going to -- I  
19 believe we are going to look at that before --  
20 and have Gary Buck look at that sometime.

21 Q. There is a document somewhere?

22 MR. ROBON: That's the documents  
23 that you showed me.

24 MR. BAHRET: The wetland studies?

25 MR. ROBON: Yes.

1 Q. Is that the same thing as this permit to go  
2 under the river you're talking about?

3 A. No, I think it might be -- that's the  
4 critical question whether that was an  
5 environmental review of the whole project or  
6 whether that included the special hoops you got  
7 to go through because of the river crossing  
8 thing.

9 MR. BAHRET: I have no other  
10 questions.

11 MR. TASSE: I just have a couple  
12 more.

13 - - -

14 RECROSS EXAMINATION

15 BY MR. TASSE:

16 Q. Let me show you what's marked as Exhibit S,  
17 and it's part of Mr. Robon's package, tab number  
18 three. Have you ever seen that picture before?

19 A. I think I did, yes. I certainly saw it. He  
20 gave me a copy of this thing, too.

21 Q. Did you take this picture?

22 A. No, I didn't.

23 Q. The date on there is 12/1/06. Do you see  
24 that?

25 A. Uh-huh.

1 Q. Yes?

2 A. Yes. That's got to be -- oh, yeah,  
3 December, '06.

4 Q. You seem to be questioning the date of that.  
5 Does that sound wrong to you?

6 A. No, I just thought it was the year before.  
7 I thought it was before the project. I see the  
8 project on it. No, that's probably right.

9 Q. Have you ever seen that condition? Did you  
10 ever see the condition of that, the property  
11 which is actually off of Old Granite, in the  
12 condition that's shown in Exhibit S?

13 A. I was there either then or slightly before  
14 or after this.

15 Q. Do you have a picture that shows the  
16 condition of the property that appears in Exhibit  
17 S different than from Exhibit S?

18 A. Do I have?

19 Q. Do you have another picture that's different  
20 from Exhibit S that shows that condition?

21 A. Yeah, I probably do.

22 Q. You think you do?

23 A. Uh-huh, and we took some --

24 Q. We went out there a couple times, so if that  
25 condition shown in Exhibit S ever existed at any

1 other time, you would have a picture of it?

2 A. You know, after --

3 Q. After you became involved?

4 A. Yeah, we went out there a few times. I  
5 don't know which -- all of them or whatever, but  
6 I have a couple other pictures of the flooding in  
7 the backyard.

8 Q. Do you know if it was on a different date or  
9 that same date?

10 A. I have pictures of other days.

11 Q. Are you certain of that?

12 A. Yeah.

13 Q. Those are undated though, right?

14 A. No, I think they are dated. Somehow or  
15 other, we got other dated pictures, if they're  
16 not screwed up in the computer. I did take other  
17 pictures.

18 Q. If you're not able to produce them, then  
19 this is the only picture we have to show the  
20 condition is Exhibit S; is that right?

21 A. But we got -- we will come up with them.

22 MR. ROBON: On your list, be sure  
23 you get all the photographs.

24 Q. Right, we're going to get all the  
25 photographs. But if you don't have them, this is

1 the only picture we have; isn't that right?

2 A. I don't know. There is probably -- he's  
3 probably got more of them that he gave to Marv.  
4 I don't know.

5 Q. Have you seen others from Marv?

6 A. No, I haven't seen --

7 Q. All right. I'm just asking about your  
8 pictures. If you don't have them, then this is  
9 the only picture you're aware of to show that  
10 condition; is that right?

11 A. Yes.

12 Q. You claim that this picture, Exhibit S, is  
13 due solely to the fact that the crossover pipe  
14 was cut?

15 A. I didn't say that.

16 Q. No?

17 A. I say that it exaggerated this, and we had  
18 water -- we received pouring right back in here.

19 Q. So you had water, you had this condition  
20 before and you claim that the crossover pipe  
21 situation made it worse?

22 A. Exaggerated it, right.

23 Q. Isn't it true that if the crossover pipe  
24 were plugged before this project ever started,  
25 then the cutting of the crossover pipe wouldn't

1 have had any effect whatsoever on the condition  
2 we see in Exhibit S; isn't that right?

3 A. Yeah, if it was completely plugged.

4 Q. Right.

5 A. Which I don't think anybody ever said.

6 Q. It would have no effect? Witnesses will say  
7 that, but if it's completely plugged, then it  
8 would have no effect; is that right?

9 A. If it was completely plugged.

10 Q. You would agree?

11 A. Yes.

12 Q. Then lastly, with respect to this mystery  
13 12-inch pipe that you talked about with  
14 Mr. Bahret, the 12-inch pipe?

15 A. Right.

16 MR. ROBON: Objection to the mystery  
17 pipe. It's visible.

18 Q. Did you ever excavate down to the pipe to  
19 examine what it looked like from its length at  
20 the origin to the manhole?

21 A. The length of it? I've seen both ends of it  
22 at the manhole and at the far end.

23 Q. When you say both ends, you mean the  
24 termination point, the very last inch of it or  
25 so, right?

1 A. We got pictures of that, too.

2 Q. All right. But you never excavated along it  
3 to see what it looks like, right?

4 A. No.

5 Q. And to your knowledge --

6 A. I take that back. When we started the  
7 mound, we did open it up and we tapped into that  
8 with an another 12-inch pipe.

9 Q. Where?

10 A. Right at Lot 16, right at 15 or 16.

11 Q. Why did you do that?

12 A. To make sure that we had good drainage  
13 there.

14 Q. This is after the project and after the  
15 crossover had been cut?

16 A. No, this was before.

17 Q. You're saying you were doing the mounding?

18 A. Right, we were doing the mounding. Before  
19 we did the mounding, we had to relocate the  
20 drainage. We had to relocate --

21 Q. Because of your mounding?

22 A. Right, because of the mounding.

23 Q. Because the mounding was going to change the  
24 water flow?

25 A. We were going to plug the mystery pipe. We

1        were going to be plugging that in and bring the  
2        -- put that in either a pipe or have the ditch  
3        much closer to Michael's house.

4        Q.    What authority did you have to tap into the  
5        12-inch pipe behind 16?

6        A.    We didn't have anything other than, you  
7        know, as far as I was concerned, we gave them  
8        notice. We were not materially changing their  
9        facilities.

10       Q.    You didn't have authority; you just did it?

11       A.    We basically just did it.

12       Q.    And is the end point or origin point that's  
13       -- of the 12-inch pipe that's behind Lot 13, is  
14       that visible today?

15       A.    Yes.

16       Q.    If you go out there and look, you can see  
17       it?

18       A.    You can see. It's right near our manhole.

19       Q.    Is it open or is there a cover or a grate or  
20       a mesh or a cap on it at all?

21       A.    No, it's just sitting there wide open.

22       Q.    Just open?

23       A.    Right.

24       Q.    Is it susceptible to leaves or debris?

25       A.    Yes, and they pushing the dirt out. They



1 put dirt in that, too, that we had to clear it  
2 out.

3 Q. If your hundred truckloads of dirt had gone  
4 over into that area, it would have covered it up,  
5 right?

6 A. That would have covered it up. We would  
7 have to relocate that more towards the  
8 development.

9 Q. Did you ever do any kind of test at the end  
10 of that 12-inch pipe to see and make certain that  
11 it flowed to where you thought it flowed, orange  
12 peel test or whatever you do?

13 A. At the time we did not.

14 Q. Any time?

15 A. I knew at that time that the manhole was  
16 there.

17 Q. I'm just asking you how do you know that  
18 this open end at Lot 13 ends up going to this  
19 manhole? How do you know that?

20 A. Well, we saw the same type of pipe in that  
21 manhole, same 12-inch; we could see that. Of  
22 course, we opened it up and put a 12-inch pipe  
23 coming out the other way.

24 Q. Yours at 16, right?

25 A. Yes.

1 Q. But that doesn't tell you anything about  
2 where that pipe goes? I'm wondering --

3 A. No, but that was one place we did open up  
4 and it was there. It was just as we suspected,  
5 right behind this railroad tie wall. That is  
6 where it was, and we tapped into it and made sure  
7 we had plenty of run-off drainage in there. And  
8 that's the one that flowed backwards when they  
9 pumped, and it couldn't go out the other way.

10 Q. When it flowed backwards, did you see water  
11 coming out of the end of the pipe at Lot 13?

12 A. Yes. You know, it's hard to tell, but it  
13 appeared to me that it was coming out there, and  
14 it was gushing out the temporary pipe that we put  
15 for the mound to pull the drainage. It was  
16 gushing out of that.

17 Q. Out of the one you put in at 16?

18 A. 16, out of that the same pipe. It was  
19 gushing out, and I called Christy, I told her,  
20 "Hey, you know, it's not working." Well, maybe  
21 it wasn't working to begin with.

22 Q. What's the status of the renegade pipe at  
23 16? What is the status of that pipe that you put  
24 to tap into the mystery pipe at 12-inch?

25 A. It's still there, and it still, you know,

1 flows backwards.

2 Q. That's still there?

3 A. That's still there.

4 Q. Where is it? Where do we find it on 16?

5 A. If you just go in the back of 16 right at  
6 the -- right near the property line, you'll see.

7 Q. Pretty direct straight down because it's  
8 right by the dirt you put in?

9 A. It's about -- if you look at the catch basin  
10 that's there on Lot 15, it's about 20 feet to the  
11 -- the end of it is 20 feet to the east.

12 Q. The pipe you put in on 16, what's the top of  
13 it look like?

14 A. It's just sitting there. It's a plastic Q  
15 pipe they call it, the plastic with the rings, a  
16 12-inch, and it's just sitting there.

17 Q. I'm not sure; I don't know what a Q pipe is.

18 A. Black plastic pipe.

19 Q. Does it have like a grate over it?

20 A. No, it's just open, just sticking right out  
21 of the mound.

22 Q. Like a flexible black pipe?

23 A. Yeah, one of those -- you know, you've seen  
24 them.

25 MR. ROBON: Accordion look.

1 A. Yeah, that accordion black pipe, but that's  
2 sticking out there still right out of the base of  
3 the mound that we started building. That's still  
4 right there.

5 Q. The reason you put that in is because you  
6 had altered the topography when you put your  
7 hundred truckloads of dirt in; is that right?  
8 That's why you put the one at 16 in?

9 A. No. Our intention was that we were going to  
10 go and block that one at 13.

11 Q. Yeah.

12 A. And that this would be, this would make sure  
13 we had some good drainage right there, that we  
14 weren't going -- you know, that this would take  
15 the run-off right into that pipe just like the  
16 one at Lot 13 did.

17 Q. But the reason you did that is because you  
18 brought the dirt in?

19 A. Yes, of course.

20 Q. And now it changed things?

21 A. Yes.

22 Q. Did you ever go on block 13? Did you ever  
23 follow up and do that?

24 A. Did we ever -- the one --

25 Q. You said you were going to go in and block

1 13? Did you?

2 A. No, we never got that far. That's still  
3 there.

4 Q. Then the other end of this pipe that's 250  
5 feet the other way, where is that? Did you ever  
6 go look and at that?

7 A. The guy showed me where it was.

8 Q. This same guy on the Gillette property?

9 A. And that ends up in a kind of French drain  
10 where the railroad just threw a big rock and  
11 stuff so it wouldn't -- they didn't put a manhole  
12 or cover or anything on it.

13 Q. They said that is where it is?

14 A. That is where it is, and I could see the  
15 rock and that.

16 Q. You say the rock, but you don't if the pipes  
17 are there? He told you that?

18 A. I never saw the pipe. We never dug it up or  
19 anything like that, but that is where he said  
20 that they had their pick-up point for his area.

21 MR. TASSE: Thank you.

22 MR. FAGNILLI: A couple quick  
23 follow-up questions.

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1                                RECROSS EXAMINATION

2            BY MR. FAGNILLI:

3            Q.    What's the address for Gary Buck?    Where  
4            does he live?

5            A.    I can get it for you.

6            Q.    Do you know what city?

7            A.    He lives in Toledo.

8            Q.    Toledo?

9            A.    Yes.

10          Q.    The City of Toledo?

11          A.    Yes.

12          Q.    Do you know what street?

13          A.    Yes.

14          Q.    What street is it?

15          A.    Robinwood down in the Old West End.

16          Q.    All right.    Just to follow up on what  
17          Mr. Tasse was asking you about, when you put this  
18          pipe in at 16, you excavated on the railroad  
19          property to do that?

20          A.    That train was right on it, and I'm sure  
21          there was some property of theirs that we were on  
22          to get that connection made.

23          Q.    Well, is the pipe on the Cambridge property  
24          or the pipe on the CSX right-of-way?

25          A.    Right on the line.

1 Q. Well, it's either on one or the other.

2 MR. ROBON: Objection.

3 A. I don't think so.

4 Q. Is it part on one and part on the other?

5 A. I think so.

6 Q. Did you excavate onto the CSX property to  
7 get to that?

8 A. We didn't get into that how close we were.

9 Q. What do you mean, you didn't get into it?

10 A. We didn't survey it. All we went, opened it  
11 up, got to that pipe and hooked into it.

12 Q. Why didn't you survey it before you did it  
13 to see where you were at?

14 A. Well, we had plenty of surveys. We weren't  
15 -- I didn't imagine that this would be  
16 questioned, you know.

17 Q. Well, didn't you think you would have to  
18 have permission to do that?

19 MR. ROBON: Objection, being  
20 argumentative.

21 Q. You have to answer out loud.

22 A. No.

23 Q. Were you on the CSX side of the five-foot  
24 railroad tie wall, or were you on the Cambridge  
25 side of the railroad tie wall when you excavated

1 at Lot 16?

2 A. It was all right on the line.

3 Q. Well, but there is a wall there, right?

4 A. And I would -- you know, but you got to  
5 understand the wall moved five feet up at the  
6 top, and how far up and down you are, but --

7 Q. Were you on top --

8 A. Basically, here's the way it was. You had  
9 railroad ties, and that pipe was right against  
10 the railroad ties on the inside of it on the  
11 railroad property, you know.

12 Q. So you excavated on the railroad side of the  
13 railroad ties?

14 MR. ROBON: Objection.

15 A. The whole thing had shifted. We don't know  
16 whose property it was unless you went and  
17 surveyed it and that. You know, that thing could  
18 have been pushed over a little bit, only a foot  
19 or so, and it would have been all on the  
20 Cambridge property. I don't really know. We  
21 didn't survey it.

22 Q. You didn't think it was important to survey  
23 it?

24 A. No, we didn't. But it's right there, and  
25 it's easily seen now.



1 Q. Then at the other end where you were going  
2 to fill it in --

3 A. Right.

4 Q. -- is that on CSX property, or is that on  
5 Cambridge property?

6 A. That's right on the line, but I would say  
7 it's the same thing, inches inside on their  
8 property.

9 Q. So it was your intention to bring the mound  
10 to that area where the 12-inch pipe is in the  
11 ditch?

12 A. We were going to do that.

13 Q. You were going to fill in that ditch?

14 A. And we proposed it to the City of Toledo  
15 and --

16 Q. Did you have written approval from CSX to  
17 fill in the ditch on their property?

18 A. The ditch was half on our property.

19 Q. Well, did you have approval to fill in the  
20 side that was on their property?

21 A. We gave them notice as to what we wanted to  
22 do, and I talked to --

23 MR. ROBON: You answered the  
24 question. You are done.

25 A. I'm done.

1 MR. ROBON: Yes or no.

2 Q. What's the answer, yes or no? Did you have  
3 permission to fill in the ditch on the CSX  
4 property?

5 MR. ROBON: He answered that  
6 question.

7 MR. FAGNILLI: No, he didn't. He  
8 started to give an answer and then you  
9 interrupted him.

10 MR. ROBON: He answered  
11 specifically. I could repeat it verbatim. He  
12 said, "I gave them notice and considered that  
13 sufficient."

14 MR. FAGNILLI: And then you told him  
15 to answer yes or no.

16 MR. ROBON: No, no.

17 MR. BAHRET: Yes, you did.

18 MR. ROBON: No, he wanted to give  
19 more, and I said just answer -- I mean, get your  
20 answers yes or no, not that question.

21 A. I mean, can this --

22 MR. ROBON: There's not a question.

23 Q. What's your answer to the --

24 MR. ROBON: Let him ask the  
25 questions, please.

1 THE WITNESS: Okay.

2 Q. In order, you know --

3 A. I did talk this over with Gene Wheeler, you  
4 know, and it's like, "What do we care? This is  
5 the old railroad thing here," you know, and I'm  
6 sure that's not a real permission. But we hadn't  
7 -- we weren't making some secret, you know, that  
8 we were sneaking in here and doing this. We  
9 talked to the City, we talked to the County, and  
10 wedid do --

11 MR. ROBON: That's all.

12 MR. FAGNILLI: That's all the  
13 questions I have.

14 (Deposition concluded at 2:46 p.m.)

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JOHN MCCARTHY

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## C E R T I F I C A T E

STATE OF OHIO     )  
                              ) SS.  
COUNTY OF WOOD    )

I, Maureen St. John, Registered Professional Reporter and Notary Public in and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named JOHN McCarthy, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid; that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment; that the signature of the said witness to the transcribed copy of his deposition was reserved.

I do further certify that I am not a relative, employee, or attorney of any of the parties hereto; further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal of office at Toledo, Ohio, this \_\_\_\_\_ day of February, 2008.

-----  
MAUREEN ST. JOHN, RPR  
Notary Public in and for the  
State of Ohio

My Commission expires November 8, 2010